92-1874

No. _____

Supreme Court, U.S.
FILED
MAY 24 1993
OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1992

SANDY RIVER NURSING CARE CENTER, et al.,
Petitioners,

v.

AETNA CASUALTY AND SURETY COMPANY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Siegel, Brill, Greupner & Duffy, P.A.
K. Craig Wildfang
Counsel of Record
Wood R. Foster, Jr.
Anne K. Weinhardt
1300 Washington Square
100 Washington Avenue South
Minneapolis, Minnesota 55401
(612) 339-7131

Opperman, Heins & Paquin
Vance K. Opperman
Robert J. Schmit
2200 Washington Square
100 Washington Avenue South
Minneapolis, Minnesota 55401
(612) 339-6900

Curtis, Thaxter, Stevens, Broder & Micoleau
Sidney St.F. Thaxter
John D. Gleason
One Canal Plaza
Portland, Maine 04112
(207) 775-2361

McTeague, Higbee, Libner, MacAdam, Case & Watson
Patrick N. McTeague
Four Union Park
Post Office Box 5000
Topsham, Maine 04086-5000
(207) 725-5581

Barnet D. Skolnik
One Canal Plaza
Post Office Box 7320
Portland, Maine 04112
(207) 775-2361

1993 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518
■ FAX 612-337-8053

QUESTIONS PRESENTED

The court of appeals determined that respondents' economic boycott and price-fixing conspiracy was a *per se* violation of Section 1 of the Sherman Act, but nevertheless affirmed the district court's grant of summary judgment to respondents.

The questions presented are:

1. Whether a *per se* illegal price-fixing conspiracy which utilized an economic boycott to coerce the enactment of legislation raising previously-enacted price ceilings is nonetheless immunized from damage liability under Section 4 of the Clayton Act by the state's enactment of such legislation?

2. Whether a state regulatory scheme which permits joint rate applications for the purpose of setting maximum permitted prices but which expressly permits the use of rates lower than the maximum, provides state action immunity to a private horizontal agreement -- not expressly authorized by the state and unknown to and unsupervised by the state -- to charge uniformly the maximum price permitted by statute?

THE PARTIES

Petitioners are Sandy River Nursing Care Center, Marshwood Nursing Center, On-Time Machining, Inc., Masters Machine, The Baker Company, Gary M. Tirabassi Tile Co., Inc., D.A. Folsom Auction Service Co., Inc., Robert Hackett Construction, Head of the Lake Market, Inc., Parcon, Inc., F.P. and C.H. Murray, Inc., C & P Cassiani Trucking, and Linnco, Inc., on their own behalf and as nominal class representatives of a putative class of Maine employers required by law to carry workers' compensation insurance.

Respondents are (1) the National Council on Compensation Insurance ("NCCI"), a national, voluntary, unincorporated association of insurers and (2) the following insurance company groups:* The Aetna Casualty and Surety Company, American International Group, Inc., CIGNA Corporation, CNA Insurance Companies, Commercial Union Insurance Companies, Continental Insurance Companies, The Hanover Insurance Companies, The Hartford, Maine Bonding and Casualty Company, Peerless/Netherlands Group, Royal Insurance Company of America, United States Fidelity and Guaranty Company, and The Travelers Insurance Companies.

None of the petitioners has any parents, subsidiaries (except wholly owned subsidiaries) and/or affiliates required to be disclosed by Rule 29.1.

---

*Each insurance company group has one or more affiliates or subsidiaries which are separately set forth in the caption of the Amended Complaint (A-42).

TABLE OF CONTENTS

	Page
Questions Presented	i
The Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutes and Rules Involved	2
Statement	2
Reasons for Granting the Petition	3
Conclusion	26

TABLE OF AUTHORITIES

Cases: **Page**

Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 12

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 13

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 19

Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) 12, 13

Boone v. Redevelopment Agency of the City of San Jose, 841 F.2d 886 (9th Cir. 1988), *cert. denied*, 488 U.S. 965 (1988) 10

Brown v. Ticor Title Insurance Co., 982 F.2d 386 (9th Cir. 1992) 10, 22, 23

Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 15

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) ..... *passim*

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) 19

City of Columbia v. Omni Outdoor Advertising, Inc., ___U.S.___, 111 S. Ct. 1344 (1991) 17

Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 6

Federal Trade Commission v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) .... *passim*

Federal Trade Commission v. Ticor Title Insurance Co., ___U.S.___, 112 S. Ct. 2169 (1992) ... *passim*

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 19

Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972) 15

Hoover v. Ronwin, 466 U.S. 558 (1984) 19

In the Matter of Michigan State Medical Soc'y, 101 F.T.C. 191 (1983) 16

In the Matter of Ticor Title Insurance Co., 112 F.T.C. 344 (1989) 23

In re Insurance Antitrust Litigation, 938 F.2d 919 (9th cir. 1991), *cert. granted in part sub nom., Hartford Fire Ins. Co. v. California*, ___U.S.___, 113 S. Ct. 52 (1992) 24

In re Superior Court Trial Lawyers Ass'n, 107 F.T.C. 510 (1986) 17

Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111 (10th Cir. 1991) 10, 22

Kansas v. Utilicorp United, 497 U.S. 199 (1990) 15

New England Motor Rate Bureau, Inc. v. F.T.C., 908 F.2d 1064 (1st Cir. 1990) 20

Oberndorf v. City and County of Denver, 900 F.2d 1434 (10th Cir.) *cert. denied* 498 U.S. 845 (1990) 10, 22

Palmer v. BRG of Georgia Inc., 498 U.S. 46 (1990) . 19

Parker v. Brown, 317 U.S. 341 (1943) 9, 19

Patrick v. Burget, 486 U.S. 94 (1988) 17, 19

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 12

Sandy River Nursing Care Center v. Aetna, 985 F.2d 1138 (1st Cir. 1993), *aff'g Sandy River Nursing Care Center v. NCCI*, 798 F. Supp. 810 (D. Me. 1992) 1

Sandy River Nursing Care Center v. NCCI, 798 F. Supp. 810 (D.Me. 1992), *aff'd sub nom. Sandy River Nursing Care Center v. Aetna*, 985 F.2d 1138 (1st Cir. 1993) 1

Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985) 19, 23, 24

Superior Court Trial Lawyers Ass'n v. Federal Trade Commission, 856 F.2d 226 (D.C. Cir. 1988), *rev'd* 493 U.S. 411 (1990) 11

324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) 19

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 22

Traweek v. City and County of San Francisco, 920 F.2d 589 (9th Cir. 1990) 10

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 15

Statutes:

Sherman Act §1, 15 U.S.C. §1 ..... *passim*

Clayton Act §4, 15 U.S.C. §15 ..... *passim*

28 U.S.C. §1254(1) 2

Me. Rev. Stat. Ann. tit. 10, §§ 1101 *et seq.* (1988) 6

Me. Rev. Stat. Ann. tit. 24-A, §2301 (1988) 5

Me. Rev. Stat. Ann. tit. 24-A, §2331 *et seq.* (1985) .. 3

Me. Rev. Stat. Ann. tit. 24-A, §2332 (1985) 3

Me. Rev. Stat. Ann. tit. 24-A, §2347 (1985) 3

Me. Rev. Stat. Ann. tit. 24-A, §§2361 et seq. (1988) 4

Me. Rev. Stat. Ann. tit. 24-A, §2362 (1988) 6

1987 Me. Laws, First Spec. Sess., ch. 559, §4 5

Other Authorities:

Areeda and Hovenkamp, *Antitrust Law* ¶212.6 (Supp. 1992) 19

Cross and Ahern, *FTC v. Ticor Title Insurance: Supreme Court Puts State Action Immunity Under the Lens*, 7 Antitrust 24 (1992). 26

Stoll and Goldfein, *"Ticor": Negating the Negative Option?*, 208 N.Y.L.J. 3 (1992). 26

In the

Supreme Court of the United States

October Term 1992

Sandy River Nursing Care Center, et al.,
Petitioners,

v.

Aetna Casualty and Surety Company, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners respectfully ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, first entered on February 25, 1993, and later corrected on March 3, 1993.

OPINIONS BELOW

The opinion of the court of appeals is reported at 985 F.2d 1138 (1st Cir. 1993). The opinion of the district court granting defendants' motion for summary judgment is reported at 798 F. Supp. 810 (D.Me. 1992). Both opinions, together with the judgment of the court of appeals and other materials, are reprinted in the Appendix hereto and are cited to herein as A_____.

JURISDICTION

The judgment of the court of appeals was initially entered on February 25, 1993. A corrected judgment was entered on March 3, 1993. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

The pertinent provisions of Section 1 of the Sherman Antitrust Act ("Sherman Act"), 15 U.S.C. §1, Section 4 of the Clayton Act, 15 U.S.C. §15, and the applicable Maine statutes are set forth in the Appendix at A-74-92.

STATEMENT

1. This case involves a conspiracy by horizontal competitors to conduct a boycott designed to coerce a state legislature into raising statutory price ceilings on workers' compensation insurance and then concertedly to raise prices to the new ceilings. The conspiracy began at a time when the state had an explicit statutory policy favoring price competition in workers' compensation insurance. The court of appeals below found the instant boycott to be "closely analogous" to that in *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), a "classic restraint of trade," and a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. §1. (A-12-13). Despite these findings, the court of appeals determined that the emergency legislation enacted to bring an end to the boycott effectively eliminated the availability of both a treble damage and injunctive remedy. The court of appeals also determined that the emergency legislation provided state action immunity to

the conspirators' agreement to charge uniformly the higher maximum prices permitted by the emergency legislation.

2. In moving for summary judgment below, respondents conceded the truth of the allegations in petitioners' Amended Complaint. (A-42). The factual summary contained in Section I of the opinion of the court of appeals (A-5-8) is substantially correct, albeit somewhat incomplete. A few points deserve emphasis.

From 1981 to 1985 respondent National Council on Compensation Insurance ("NCCI") and its member insurers were unsuccessful in persuading the Maine legislature to enact legislation favorable to the insurers. (A-5-6). In fact, in 1985 legislation was enacted providing for an 8% rate rollback, freezing rates at that level until 1987, and limiting individual insurers' rate increases in 1987, 1988 and 1989 to a maximum of 10% per year. 1985 Me. Laws ch. 372, Subchapter II, codified at Me. Rev. Stat. Ann. tit. 24-A, §2331 et seq. (1985) (hereinafter "1985 Competitive Rating Act") (A-74).

Most importantly, however, the 1985 Competitive Rating Act explicitly stated as its purpose, *inter alia*:

> 1. To prohibit price fixing agreements and other anticompetitive behavior by insurers . . . ;
>
> 3. To promote price competition among insurers . . . .

Me. Rev. Stat. Ann. tit. 24-A, §2332 (1985)(A-74).[1]

---

[1] *See also* Me. Rev. Stat. Ann. tit. 24-A, §2347 (1985)(A-75). Maine thus joined many other states which had moved toward deregulating various lines of insurance and which had adopted explicit state policies

Having failed to obtain the modification or repeal of the 1985 Competitive Rating Act in the courts or in the legislature through the normal, lawful processes, respondents entered into the conspiracy alleged in the Amended Complaint. Respondents' strategy commenced with concerted action to refuse to write insurance in Maine's voluntary market in order to put economic pressure on employers and the state (Jt. App. 578-587, 611-613), resulting in a substantial shift of employers to the higher priced residual (or "assigned risk") market. (Jt. App. 570). The economic pressure was further intensified when "between late summer and October 1987, virtually all workers' compensation insurers prepared to withdraw from the state." (A-7).

In November 1987, the Governor and the Legislature succumbed to the emergency created by respondents' conspiracy and repealed the 1985 Competitive Rating Act, and enacted in its place a new rating act[2] which eliminated the price ceilings. After the emergency legislation was enacted, the respondents rescinded their withdrawal notices.

---

promoting and favoring price competition in insurance. *See, e.g.*, Jt. App. 607. (Page references to "Jt. App." are to the Joint Appendix submitted by the parties to the court of appeals.)

[2]1987 Me. Laws, First Spec. Sess., ch. 559 (effective November 20, 1987) (codified in part at Me. Rev. Stat. Ann. tit. 24-A, §§2361 et seq. (1988) and referred to herein as the "emergency legislation")(A-78). As in *Trial Lawyers* (*see* 110 S. Ct. at 772) there is no doubt about the reasons the legislature acted. The Emergency Preamble to Chapter 559 stated: "Whereas, most, if not all, of the insurance carriers writing such workers' compensation insurance in the State are withdrawing from the business, . . . in the judgment of the Legislature, these facts create an emergency . . . and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; . . . ." (A-78).

Although the emergency legislation also implicitly provided for joint rate applications to set maximum rates,[3] Maine's insurance statutes continued to favor price competition:

> Nothing in this chapter is intended to prohibit or discourage reasonable competition, or to prohibit, or encourage except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates . . . .

Me. Rev. Stat. Ann. tit. 24-A, §2301 (1988) (A-91).[4] Under the emergency legislation insurers were specifically permitted to compete on price by using rates less than the maximum. 1987 Me. Laws, First Spec. Sess., ch. 559, §4;

---

[3]The court of appeals noted that the emergency legislation provided for joint rate applications

> *somewhat indirectly* through repeal of the 1985 Act, which meant that the joint ratemaking provisions that then existed for all lines of insurance sold in Maine again were applicable to workers' compensation insurance.

(A-19 n.9)(emphasis added).

[4]The following 31 other states have adopted substantially the same provision for one or more lines of insurance: Alaska, Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia. The Commonwealth of Puerto Rico has a similar statute. A list of the statutory citations appears at A-93. These statutes appear to be based upon one of several model acts prepared by the National Association of Insurance Commissioners ("NAIC").

Me. Rev. Stat. Ann. tit. 24-A, §2362 (1988) (A-79).[5]

Following respondents' boycott of the workers' compensation market in 1987, the maximum rates were increased by amounts substantially exceeding the 10% caps in the 1985 legislation. By agreement, all of the respondents raised their prices to the new price ceilings. Amended Complaint ¶¶36, 41(b) (A-59-60, 62). Each petitioner, and each member of the class they seek to represent, was thus injured by the respondents' conspiracy.

3. These consolidated actions were commenced as class actions in September 1991, alleging violations of Section 1 of the Sherman Act, 15 U.S.C. §1, (A-72) and the Maine Antitrust Act, Me. Rev. Stat. Ann. tit. 10, §§ 1101 *et seq.* (A-91). On December 16, 1991, respondents moved for summary judgment, arguing that their conspiracy was immune from Sherman Act scrutiny under the state action doctrine.

By Order and Memorandum of Opinion (A-23) the district court granted respondents' motion. The district court concluded that "Defendants' conspiracy to press for legislation permitting them to charge higher rates" was immune under the *Noerr* doctrine,[6] and that the "Defendants' participation in ratesetting proceedings after legislation was enacted in 1987 which permitted rate increases" was immune under the state action doctrine. (A-41).

---

[5]That section provided, in relevant part, that:

> Rates determined by the superintendent are maximum rates. Premium rates less than those approved may be used if filed with the superintendent within five days after commencing use.

[6]*Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

Petitioners timely appealed to the court of appeals. The court of appeals rejected the district court's determination that the boycott was protected by the *Noerr* doctrine, and, quoting this Court's opinion in *Trial Lawyers*, it held that the insurers' boycott "beyond doubt 'constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act.'" (A-12). However, without considering Section 4 of the Clayton Act, 15 U.S.C. § 15, or the policy considerations and legal analysis outlined in this Court's decision in *Federal Trade Commission v. Ticor Title Insurance Co.*, ___U.S.___, 112 S. Ct. 2169 (1992), the court of appeals sustained summary judgment for respondents by affirming the district court's view that the emergency legislation "superseded defendants' previous conduct, rendering the rate hikes 'an act of government' immune under *Parker* rather than injury inflicted by defendants' conspiracy." (A-14). In also rejecting petitioners' argument that respondents' anticompetitive conduct occurring after the emergency legislation was enacted was neither "clearly articulated and affirmatively expressed as state policy" nor "actively supervised by the State itself," *Ticor*, 112 S. Ct. 2176 (quoting *California Retail Liquor Dealers' Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)), the court of appeals stated:

> The 1987 Act provided for joint rate filings and, in our view, it must be construed as implicitly condoning an agreement among insurers to charge the rates they jointly propose . . . .
>
> [T]he legislature evidently viewed the sort of "price-fixing" alleged by plaintiffs as benign . . . .
>
> [T]he fact that insurers may charge less than the

> approved rate is of little significance when it is juxtaposed with the uniform approach to ratemaking that is the overriding characteristic of the reformed system.

(A-19-20). The court of appeals held that petitioners could recover only damages occurring "while the boycott was in place." (A-12). The court of appeals also appears to have held that petitioners could only have sought injunctive relief "during the boycott period." *Id.*

The court of appeals order was entered on February 25, 1993. A corrected order was entered on March 3, 1993.

REASONS FOR GRANTING THE PETITION

This case presents two important questions: the first was left unanswered by the decision in *Trial Lawyers*; the second presents this Court, inter alia, with a conflict between the First Circuit, on the one hand, and the Ninth and Tenth Circuits on the other, regarding the application of the "clear articulation" prong of *Midcal*. Resolution of the conflict between the Ninth Circuit and the First Circuit is particularly important since 32 states have substantially similar insurance statutes which explicitly are not "intended to prohibit or discourage reasonable competition."

In *Trial Lawyers* this Court granted certiorari to consider whether persons who conducted an economic boycott designed to influence the government to raise prices which could be charged by the boycotters were protected by the First Amendment from a finding of *per se* illegality under Section 1 of the Sherman Act. This question called for balancing the free market policies of the antitrust laws and the *per se* condemnation of such

boycotts against the First Amendment rights of the boycotting lawyers. The Court of Appeals for the District of Columbia had determined that the balance tipped in favor of the First Amendment, and created an exception to the *per se* rule to protect First Amendment rights by requiring proof of market power before such a boycott could be found unlawful. This Court reversed the court of appeals and held that, despite the acknowledged expressive component of the economic boycott, the First Amendment did not require a departure from the *per se* rule. The Court determined that in such cases the limited infringement on First Amendment rights was outweighed by the nation's fundamental economic policies embodied in the Sherman Act and effectuated by adherence to the *per se* rule.

This petition presents, in virtually identical factual circumstances, the equally important question of whether consumers who pay the higher prices charged to them after such a boycott are precluded by concepts of cooperative federalism from recovering damages. This question calls for balancing the free market policies of the antitrust laws against the federalism concerns which underlie the state action doctrine first recognized in *Parker v. Brown*, 317 U.S. 341 (1943). The Court of Appeals for the First Circuit tipped the balance in favor of federalism concerns when it concluded that the action of the Maine legislature to raise the price ceilings in order to bring an end to the boycott "superseded" the boycott, and precluded recovery of damages by businesses which paid the higher prices thereafter charged by the boycotters. Since *Trial Lawyers* this Court has not had occasion to consider whether a price-fixing boycott is immunized from Clayton Act damages by the state's enactment of the legislation demanded by the conspirators.

The second question presented involves the two-pronged test for state action immunity developed in *Midcal*. There is apparent disagreement in the courts, exemplified by the decision of the court of appeals below, regarding the degree of specificity of state authorization required for a finding that a private party's particular anticompetitive activity was undertaken pursuant to a "clearly articulated and affirmatively expressed" anticompetitive state policy, the first prong of *Midcal*. As more fully discussed below, in contrast to the First Circuit's approach, the Ninth[7] and Tenth[8] Circuits have developed and applied a two-part test to determine whether *Midcal's* "clear articulation" prong is satisfied. Since *Midcal* this Court also has not had occasion to consider the application of both prongs of that analysis in the same case. Thus, the Court has not had occasion to define the necessary nexus between the "clear articulation" and "active supervision" prongs.

A. THE FIRST QUESTION PRESENTED WAS NOT PRESENTED IN *TRIAL LAWYERS* AND IS OF SUCH IMPORTANCE THAT IT SHOULD BE SETTLED BY THIS COURT.

1. After *Trial Lawyers* a key issue remains unresolved. The insurers' boycott in Maine is indistinguishable from the lawyers' boycott in *Trial*

---

[7]*See Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992); *Traweek v. City and County of San Francisco*, 920 F.2d 589 (9th Cir. 1990); and *Boone v. Redevelopment Agency of the City of San Jose*, 841 F.2d 886 (9th Cir. 1988), *cert. denied*, 488 U.S. 965 (1988).

[8]*See Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111 (10th Cir. 1991); *Oberndorf v. City and County of Denver*, 900 F.2d 1434 (10th Cir.) *cert. denied*, 498 U.S. 845 (1990).

Lawyers; it also was a coercive concerted refusal to deal that had the purpose and effect of raising prices once the government succumbed to the boycott. 493 U.S. at 419. Since *Trial Lawyers* was an enforcement action by the FTC under §5 of the Federal Trade Commission Act, 15 U.S.C. §45, and not a private action under §4 of the Clayton Act, 15 U.S.C. §15, this Court was not presented with the equally important additional question of the availability of the treble damage provision of §4 to remedy and deter such coercive boycotts. The Court should take this opportunity to address this important question.[9]

2. The court of appeals' decision raises concerns similar to those that motivated this Court to grant certiorari in *Trial Lawyers*. The Court of Appeals for the District of Columbia in its decision in *Superior Court Trial*

---

[9]This Court has not yet acted on two petitions for certiorari raising issues of antitrust injury and standing under Section 4 arising out of the boycott challenged in *In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991). *See Winterthur Reinsurance Corp. of America v. State of California*, No. 91-1131 and *Unionamerica Insurance Company Ltd. v. State of California*, No. 91-1146. The Court has granted certiorari, 113 S. Ct. 52 (1992), and has received briefs and heard argument, on two other petitions arising out of the same case. *See Hartford Fire Insurance Co. v. State of California*, No. 91-1111 and *Merrett Underwriting Agency Management, Ltd. v. State of California*, No. 91-1128. The Court invited the views of the Solicitor General in all four cases. 112 S. Ct. 1470. The Solicitor General submitted a brief dated August 1992 expressing the United States' views on five issues raised by those petitions, including antitrust injury/standing and state action. Even though the Court has not yet acted on the petitions raising issues of antitrust injury and standing, and has excluded the state action issue in those petitions in which review was granted, 113 S. Ct. 52, the Court may find the views on the United States in that brief relevant to its consideration of the instant petition.

Lawyers Ass'n. v. Federal Trade Commission, 856 F.2d 226 (D.C. Cir. 1988), *rev'd* 493 U.S. 411 (1990), relied upon the First Amendment to craft an exception to the *per se* rule for economic boycotts that had an "expressive component." *Id.* at 249. Even in the absence of conflict among the courts of appeals, this Court, concerned "about the implications of the Court of Appeals' unique holding," 493 U.S. at 421, granted the FTC's petition for certiorari and reversed the decision, fearing that the court of appeals' decision "would create a gaping hole in the fabric" of the antitrust laws. 493 U.S. at 431-32. The Court determined that the First Amendment rights claimed by the lawyers were outweighed by the paramount economic policy of the antitrust laws. In this case, concerns similar to those raised in *Trial Lawyers* should motivate the Court to grant the instant petition in order to weigh the federalism concerns which apparently motivated the court of appeals to preclude a damage remedy for the unlawful conduct, against the competition policy of the antitrust laws. The court of appeals' decision similarly threatens to create a "gaping hole" in the protections afforded by Section 4 of the Clayton Act.

3. **The court of appeals failed to apply Section 4 of the Clayton Act.** Misled by the view that the emergency legislation "superseded" the boycott, both the district court and the court of appeals erred in ignoring petitioners' argument below that the issue of whether there was compensable antitrust injury and damages could only properly be analyzed under Section 4 of the Clayton Act, 15 U.S.C. § 15, and this Court's cases construing that section. The court of appeals did not even cite Section 4, or any cases thereunder, in its opinion. This Court's decisions in *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982)

and *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), compel a finding that petitioners suffered compensable antitrust injury.

This Court noted in *McCready* that:

> "On its face, §4 contains little in the way of restrictive language." And the lack of restrictive language reflects Congress' "expansive remedial purpose" in enacting §4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations . . . .

McCready, 457 U.S. at 472 (citations omitted). The Court held that when the harm complained of was "clearly foreseeable" and "the injury alleged is so integral an aspect of the conspiracy alleged" then the plaintiff should ordinarily be given standing to sue under Section 4. *Id.* at 479-81. Similarly, in this case, the harm to the petitioners was "clearly foreseeable," indeed intended by, respondents. The petitioners' loss was also an "integral aspect of the conspiracy alleged."

In *Atlantic Richfield Company v. USA Petroleum Company*, 495 U.S. 328, 341-46 (1990), this Court noted the distinction between the question of liability under Section 1 of the Sherman Act and the questions of standing and antitrust injury under Section 4 of the Clayton Act. Unless the instant petition is granted, the court of appeals' blurring of these two separate issues may mislead other courts into similar errors.

4. The court of appeals' decision eliminates any effective damage remedy for such *per se* unlawful boycotts. The court of appeals' determination that any recoverable "direct marketplace injuries" attributable to the *per se* boycott terminate when the government acts in response to the boycott (*see* A-9-13), and that petitioners could only have recovered damages "based on injury occurring while the boycott was in place . . . ," (A-13), effectively deprives both private victims and government enforcers of a damage remedy under Sections 4 and 4C of the Clayton Act, 15 U.S.C. §§15, 15c. The decision also would result in a *per se* violation being immunized from damage liability by its very success in coercing the government to act. The court of appeals' response (A-17 n.7) that this is not so because "unlawful boycotts with direct marketplace impact will result in accountability for the *market* injury, regardless of their success in inducing government action" is plainly inadequate for two reasons. First, in the many cases where the boycott is threatened, but never implemented because the government capitulates in order to avoid the threatened "market injury," there would (under the court of appeals' formulation) be *no* recoverable "market injury" even though the *per se* unlawful conspiracy indisputably was a cause in fact of injury to consumers in the market.

Second, even in cases such as the instant case, where at least part of the boycott (*i.e.* the concerted curtailment of voluntary writing of insurance) was implemented before the Legislature acted, and thus there was *some* direct market injury under the court of appeals' formulation, the amount of that injury (not to mention the difficulty of quantifying and proving the amount) is so small relative to the huge financial rewards of the successful boycott as to provide no disincentive to conspire. A rational business person could easily conclude that the benefits of

a successful conspiracy outweigh its likely risks.

The decision by the court of appeals seriously undermines the vital role played by private treble damage actions in enforcing the antitrust laws. This Court has emphasized "that our interpretation of §4 must promote the vigorous enforcement of the antitrust laws." *Kansas v. Utilicorp United*, 497 U.S. 199, 214 (1990). Congress' purpose in creating a group of "private attorneys general" to enforce the antitrust laws under Section 4 was to deter antitrust violators, *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 262 (1972), and to provide compensation to victims of antitrust violations. *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977). These important policies are undermined by the court of appeals' decision.

5. The court of appeals' decision threatens the nation's free market economic policy. This Court has repeatedly emphasized that "[t]he preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom." *Ticor*, ___U.S.___, 112 S. Ct. at 2176 (citation omitted). In *Trial Lawyers* this Court explained that "The *per se* rules also reflect a long-standing judgment that the prohibited practices by their nature have 'a substantial potential for impact on competition.'" 493 U.S. at 433-34 (citation omitted).

Horizontal economic boycotts and price fixing are *per se* unlawful, and conclusively presumed to be unreasonable, "because of their actual or potential threat to the central nervous system of the economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-26 n.59. The "central nervous system of the economy" relies to a considerable extent upon regulation by state and local government as a necessary element. States, counties, and

municipalities act as regulator and gatekeeper in a myriad of private economic activities. Experience under the Sherman Act has shown that nascent cartels are ready, willing and able to combine their economic power and, by boycott, to constrict the supply of vital goods and services in order to coerce favorable economic regulation by government. *See, e.g., In the Matter of Michigan State Medical Soc'y.*, 101 F.T.C. 191 (1983). Under *Trial Lawyers* such boycotts are *per se* violations of Section 1 of the Sherman Act but would be, under the court of appeals' formulation, effectively irremediable under Section 4 of the Clayton Act.

The threat presented by the error of the court of appeals extends beyond the states within the First Circuit. Respondent NCCI is a national organization and the respondent insurance companies operate in almost all states. If unreviewed by this Court, the court of appeals' decision may be taken by these respondents (and other insurers) as an invitation to employ similar price-fixing boycotts in other states. The rationale of the court of appeals would appear to apply to price-fixing boycotts in any line of insurance, or, indeed, in almost any regulated industry. However, even if only workers' compensation insurance is considered, the threat to the economy is staggering since in almost every state almost every business is required by law to buy workers' compensation insurance.

The nation's free market economy is seriously undermined by the unprecedented decision of the court of appeals that the emergency enactment by a legislature to end an unlawful boycott, which was the very goal of the boycott, "superseded defendants' previous conduct" [*i.e.*,

the boycott]. (A-14).[10]

6. This Court's decision in *Omni*[11] does not bar the treble damage relief petitioners seek. The court of appeals erred in determining that this Court's decision in *Omni* bars the relief sought by petitioners. (*See* A-14-15). Imposing damage liability on these boycotting insurers simply does not threaten the decisions of state sovereigns as feared by the Court in *Omni*. As is more fully discussed *infra* at 20-21, the court of appeals confused the unauthorized anticompetitive conduct challenged by petitioners, *i.e.* that aspect of respondents' conspiracy whereby they agreed to charge only the maximum permitted price, with the other joint activities that were authorized, *i.e.* joint rate applications. While the State of Maine "acted" to permit joint rate applications leading up to the setting of the maximum rates, the private agreement of respondents to charge *only* the maximum was their *own* "act", not the state's. As this Court held in *Ticor* (quoting *Patrick v. Burget*, 486 U.S. 94 (1988)):

---

[10]In its decision in *Trial Lawyers* rejecting the asserted First Amendment defense the FTC stated:

> We think it clear, however, that if respondents had elected to kidnap a city official and to hold him hostage until their demands were granted, their conduct would be subject to governmental regulation, despite its communicative aspect.

In re Superior Court Trial Lawyers Ass'n., 107 F.T.C., 510, 592 (1986). Similarly here, if the insurers had elected to kidnap the Governor in order to coerce the Legislature to raise the price ceilings, the enactment of such legislation cannot responsibly be viewed as protecting the kidnappers from the consequences of their criminal act.

[11]*City of Columbia v. Omni Outdoor Advertising, Inc.*, ___U.S.___, 111 S. Ct. 1344 (1991).

> [T]he state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies.

112 S. Ct. at 2177. Since the act of which petitioners complained, and which caused their injury, was *not* the state's act of raising the price ceiling, but rather respondents' agreement to boycott and to charge *only* the maximum prices, petitioners do not seek to "look behind" the action of the Maine legislature.[12]

B. THE COURT SHOULD REVIEW THE SECOND QUESTION (1) BECAUSE THE COURT OF APPEALS DECIDED THE ISSUE OF THE APPLICABILITY OF THE STATE ACTION EXEMPTION IN A WAY WHICH CLEARLY CONFLICTS WITH THIS COURT'S PRIOR DECISIONS AND (2) TO RESOLVE A CONFLICT BETWEEN THE FIRST CIRCUIT AND THE NINTH AND TENTH CIRCUITS.

The court of appeals' decision plainly conflicts with this Court's prior decisions interpreting the state action doctrine. As the State of Maine told the court of appeals below, "the immunity conferred by *Parker* is completely inapplicable in this case." Brief of the State of Maine as

---

[12]Respondents' conspiracy is no different from any price-fixing conspiracy in an industry subject to price-regulation. It will always be true that a private conspiracy to fix prices *at* the government-set ceiling price will injure buyers *less* if the ceiling is set lower rather than higher, but that does not mean that buyers are injured by "state action" (as opposed to being injured by private action) whenever there is a private conspiracy to fix prices at whatever ceiling the government establishes.

Amicus Curiae at 8 n.4.[13] Moreover, the First Circuit's analysis conflicts significantly with that of the Ninth and Tenth Circuits.

Since *Parker v. Brown* the Court has considered the circumstances under which the anticompetitive conduct of private parties will be found to be "state action".[14] Professors Areeda and Hovenkamp have noted the "pervasive vexatiousness" of the question of "the extent, if any, to which [a private party] enjoys the state's immunity from antitrust liability." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶212.6 (Supp. 1992). Indeed, in a concurring opinion in *Ticor* Justice Scalia expressed skepticism "about the *Parker v. Brown* exemption for state programmed private collusion in the first place." 112 S. Ct. at 2181. The Court's decisions have established a two-pronged test described in *Midcal*, and re-emphasized in *Ticor*. That test is designed to immunize only that private anticompetitive conduct which a state actually desires, intends and supervises, such that it is proper to conclude that the private conduct is truly "state action."

---

[13]Indeed, the decision below conflicts so starkly with this Court's application in *Ticor* of the "active supervision" prong of *Midcal* that summary reversal may be appropriate. *See, e.g., Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990). The decision of the court of appeals not only fails to cite *Ticor* but, more importantly, it fails to consider the important policies requiring a narrow construction of the state action doctrine. *See Ticor,* 112 S. Ct. at 2178.

[14]*See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *California Retail Liquor Dealers' Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *Patrick v. Burget*, 486 U.S. 94 (1988); and, most recently, *Ticor*.

In *Ticor* this Court not only reiterated the nation's commitment to the policy of economic freedom promoted by the antitrust laws, but also reaffirmed the need to "disfavor" claims of state action immunity by private parties. 112 S. Ct. at 2178. In reversing the decision of the Third Circuit therein, this Court *specifically* disapproved as "insufficient" the formulation of the state action doctrine by the First Circuit in *New England Motor Rate Bureau, Inc. v. F.T.C.*, 908 F.2d 1064 (1st Cir. 1990). *Ticor*, 112 S. Ct. at 2179. Rejecting the First Circuit standard, this Court found that a party claiming state action immunity "must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate-setting scheme." *Id.* If anything, the expansive and uncritical treatment by the First Circuit of the respondents' claims of state action immunity in the instant case is even less rigorous, and therefore even more "insufficient," than in the *New England Motor Rate Bureau* decision which this Court expressly disapproved in *Ticor*.

1. The court of appeals failed to focus properly on the challenged anticompetitive conduct. a. Under *Midcal* and *Ticor*, the first step in determining the applicability of the state action doctrine is to focus on the particular challenged anticompetitive conduct. *See Ticor*, 112 S. Ct. at 2175; *Midcal*, 445 U.S. at 105.[15] The court

---

[15]As the Court observed in *Ticor*:

> The fact of the matter is that the States regulate their economies in many ways not inconsistent with the antitrust laws. For example, Oregon may provide for peer review by its physicians without approving anticompetitive conduct by them. Or Michigan may regulate its public utilities without authorizing monopolization in the market for electric light

of appeals erred in focusing not on the conduct challenged by petitioners (the agreement to charge the maximum rates) but rather focusing on the fact that "[t]he 1987 Act provided for joint rate filings . . . ." (A-19). Then, without applying the discriminating analysis required by *Midcal* and *Ticor*, the court of appeals concluded that respondents' agreement to charge the maximum permitted price was immunized by the state action doctrine. (A-21-22).

b. Rather than determining that Maine had a "clearly articulated and affirmatively expressed policy" approving a private agreement among insurers to charge only the maximum price, the court of appeals instead found only that "The 1987 Act . . . *must be construed as implicitly condoning an agreement among insurers to charge the rates they jointly propose* . . . . [T]he legislature evidently viewed the sort of 'price-fixing' alleged by plaintiffs as benign . . . ." (A-19) (emphasis added) (footnote omitted). Not only is there nothing in the record to support the court of appeals' construction of the statute, but plainly a conclusion that a statute "implicitly condones" price-fixing is a far cry from the determination required under *Ticor* and *Midcal* that the *particular* anticompetitive conduct was "clearly articulated and affirmatively expressed" by the State.[16] Any less rigorous

---

bulbs.

Id. at 2178 (citations omitted). Or in Maine, the State may authorize joint rate applications without approving a private agreement by all insurers to adhere to the maximum rates set by the State.

[16]As noted *supra* at note 3, the court of appeals acknowledged that the new statute provided for joint rate filings only "indirectly", hardly a clear expression of the Legislature's intent to approve the private anticompetitive conduct at issue.

standard will "impede [states'] freedom of action, not advance it," *Ticor*, 112 S. Ct. at 2178, and would displace "essential national policies . . . by state regulation intended to achieve more limited ends." *Id.*

The Ninth Circuit, in the cases cited *supra* note 7, culminating in *Brown v. Ticor*, properly focused on the specific challenged conduct and applied a two-part test to determine if the "clear articulation" prong is satisfied:

> The court must determine (1) whether the legislature authorized the challenged activity and, if so, (2) whether the legislature intended to displace competition with regulation.

Brown, 982 F.2d at 392. In *Brown* the Ninth Circuit construed a statute identical to the Maine statute quoted *supra* p. 5, and substantially the same as the insurance regulatory statutes of 31 other states. (*See supra* note 4). The Ninth Circuit held that a statute which states "[n]othing in this article is intended to prohibit or discourage reasonable competition" demonstrated that the state had no "intent to displace competition," and so the "clear articulation" prong of *Midcal* was not satisfied. 982 F. 2d at 392. Thus, the First and Ninth Circuits directly conflict on the effect of an identical statute, one that is repeated in the statutes of 31 other states. In non-insurance contexts, the Tenth Circuit has adopted the same two-part test for the "clear articulation" prong. *See Jacobs*, 927 F.2d 1111; *Oberndorf*, 900 F.2d 1434.[17] The

---

[17]Of the cited Ninth and Tenth Circuit cases, only *Brown* involved a private party defendant, as opposed to a municipal defendant. This Court has applied the state action doctrine more leniently to municipalities, and has exempted municipalities from the "active supervision" prong of *Midcal*, because "[w]e may presume, absent a

Ninth and Tenth Circuits' analysis has the distinct advantage, over that adopted by the First Circuit herein, of allowing the court to determine with greater confidence whether the challenged activity was, in fact, authorized by the legislature, and avoids the need, under the First Circuit's analysis, to speculate regarding what activities are "implicitly condoned" by a particular statute.[18]

c. Compounding its error, the court of appeals then concluded that "the Superintendent's involvement in reviewing and modifying the insurers' proposed rates unquestionably meets prong two's requirement of active state supervision." (A-21). As described above, the court's failure to properly focus on the challenged conduct led it to immunize conduct (*i.e.* the agreement to charge at the maximum) which the State not only did not actively supervise, but of which the State was unaware.[19] As the

---

showing to the contrary, that the municipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985). Thus, while the analysis in *Brown* is substantially at variance with that of the First Circuit, it also may be an overly lenient application of the state action doctrine to a private party.

[18]The decision in *Brown* (a follow-on private action under Section 4 of the Clayton Act challenging the same private price-fixing agreement at issue in *Ticor*) amply illustrates the conflicting views regarding the "clear articulation" test. In *Brown* the Ninth Circuit held that the Arizona regulatory scheme failed the "clear articulation" prong of *Midcal*; in 1986, after *Southern Motor Carriers*, the FTC had conceded that the same Arizona statutes satisfied the "clear articulation" test. *In the Matter of Ticor Title Insurance Co.*, 112 F.T.C. 344, 377, 410 (1989). *See also Ticor*, 112 S. Ct. at 2175.

[19]There is no evidence in the record that the State knew of the challenged agreement to charge only the maximum, nor that the State "took the necessary steps to determine the specifics of the price-fixing

Ninth Circuit explicitly has held, "[s]tate approval of one activity is not state approval of a related but distinct activity." *In re Insurance Antitrust Litigation*, 938 F.2d 919, 931 (9th Cir. 1991), *cert. granted in part sub nom., Hartford Fire Insurance Co. v. California*, ___U.S.___, 113 S. Ct. 52 (1992). (*See supra* note 9). The advantage of the Ninth Circuit's two-part test under *Brown* is that it permits a court to determine if there is a nexus between any anticompetitive activity which has been authorized by the legislature, and the anticompetitive activity which has purportedly been "actively supervised" by the state. Without such a determination a court might erroneously find state action immunity (as the First Circuit did) when a state has authorized one form of anticompetitive activity, but has only actively supervised some other anticompetitive activity.

The decision in *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985) is not to the contrary, and the court of appeals' reliance on that case is misplaced. (A-20). In *Southern Motor Carriers* this Court rejected the argument that a particular anticompetitive activity could only be attributed to a "clearly articulated state policy within the meaning of the *Midcal* test's first prong" when the activity is "compelled" by the state. 471 U.S. at 59. The Court found that an express policy authorizing (but not compelling) collective rate applications could immunize collective rate applications, which was the conduct challenged by the government. The Court observed:

> Most common carriers probably will engage in collective ratemaking, as that will allow them to share the cost of preparing rate proposals. If the

---

or ratesetting scheme." *See Ticor*, 112 S. Ct. at 2179.

> joint rates are viewed as too high, however, carriers individually may submit lower proposed rates to the Commission in order to obtain a larger share of the market. Thus, through the self-interested actions of private common carriers, the *States may achieve the desired balance between the efficiency of collective ratemaking and the competition fostered by individual submissions.*

Id. at 59-60 (footnote omitted) (emphasis added).

Here, in the emergency legislation the State of Maine adopted a clearly articulated and actively supervised policy to permit collective rate applications, but did *not* go further and did *not* clearly articulate nor actively supervise a policy permitting a private agreement to charge only the maximum. The State of Maine's "desired balance between the efficiency of collective ratemaking and the competition fostered by individual submissions" was frustrated by respondents' private agreement not to compete on price. Under *Southern Motor Carriers* such conduct is not immunized.

Review of the decision below will offer this Court the opportunity to clarify the application of the "clear articulation" test to private parties, to define the proper nexus between the two prongs of *Midcal*, and to alleviate the "pervasive vexatiousness" of the question of the scope of a private party's claim to "the state's immunity from antitrust liability."

2. The court of appeals' lax scrutiny of claims of state action immunity threatens to mislead other courts. The failure of the court of appeals to apply the rigorous scrutiny of claims of state action required by the *Ticor* decision, coming so soon after that decision, threatens to mislead other courts, particularly those in the First

Circuit, into misconstruing the *Ticor* decision. The *Ticor* decision represents a re-affirmation of the need to critically review claims of state action immunity by private parties.[20] If the decision of the court of appeals is left unreviewed and permitted to remain the law of the First Circuit, substituting an "implicitly condoned" standard for this Court's "clearly articulated and affirmatively expressed" standard, then other courts may make similar errors.

CONCLUSION

No antitrust offenses are more "dangerous to society" than price-fixing and boycotts. *Trial Lawyers*, 493 U.S. at 434 n.16. While "some boycotts and some price-fixing agreements are more pernicious than others . . . ." *Id.* at 435, as in *Trial Lawyers* this case involves a dramatically successful, and harmful, effect on competition. Despite these facts, and despite its finding of a *per se* violation, the court of appeals failed to consider Section 4 of the Clayton Act, and fashioned an extremely broad state action immunity inconsistent with this Court's precedents and with the analysis utilized by the Ninth and Tenth Circuits. The court of appeals' decision thus threatens to abrogate the protections of the federal antitrust laws for consumers in vast sectors of the economy that are subject to "state regulation intended to achieve more limited ends." *Ticor*, 112 S. Ct. at 2178.

Because of the importance of the questions presented in this petition, the Court may wish to invite the Solicitor

---

[20]Commentators agree. *See, e.g.*, Stoll & Goldfein, *"Ticor": Negating the Negative Option?*, 208 N.W.L.J. 3 (1992); Cross & Ahern, *FTC v. Ticor Title Insurance: Supreme Court Puts State Action Immunity Under the Lens*, 7 Antitrust 24 (1992).

General to file a brief expressing the views of the United States.

For the reasons set forth herein, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SIEGEL, BRILL, GREUPNER & DUFFY, P.A.
K. Craig Wildfang
(Counsel of Record)
Wood R. Foster, Jr.
Anne K. Weinhardt
1300 Washington Square
100 Washington Avenue So.
Minneapolis, MN 55401
(612) 339-7131

OPPERMAN HEINS & PAQUIN
Vance K. Opperman
Robert J. Schmit
2200 Washington Square
100 Washington Avenue So.
Minneapolis, MN 55401
(612) 339-6900

CURTIS, THAXTER, STEVENS, BRODER & MICOLEAU
Sidney St.F. Thaxter
John D. Gleason
One Canal Plaza
Portland, ME 04112
(207) 775-2361

MCTEAGUE, HIGBEE, LIBNER, MACADAM, CASE & WATSON
Patrick N. McTeague
Four Union Park
P.O. Box 5000
Topsham, ME 04086
(207) 725-5581

Barnet D. Skolnik
One Canal Plaza
P.O. Box 7320
Portland, ME 04112
(207) 775-2361

May 1993

INDEX TO APPENDIX

Judgment of the United States Court of Appeals for the the First Circuit, dated February 25, 1993 ..... A-1

Corrected Judgment of the United States Court of Appeals for the First Circuit, dated March 3, 1993 ..... A-2

Opinion of the United States Court of Appeals for the First Circuit, dated February 25, 1993, 985 F.2d 1138 ..... A-3

Order and Memorandum of Opinion of the United States District Court for the District of Maine, dated June 18, 1992, 798 F. Supp. 810 .. A-23

Amended Complaint A-42

Sherman Act § 1 ..... A-72

Clayton Act § 4 ..... A-73

1985 Maine Statutes (repealed) (pertinent text only)* A-74

1987 Emergency Legislation (pertinent text only)* A-78

Maine Statutes in effect throughout relevant period (pertinent text only)* A-91

Citations to the statutory provisions of 31 other states and the Commonwealth of Puerto Rico with statutes substantially similar to Me. Rev. Stat. Ann. tit. 24-A § 2301 ..... A-93

* A more complete "regulatory appendix" was submitted by respondents to the district court and is found in the parties' Joint Appendix submitted to the court of appeals (Jt. App. at 264-538).

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1856

SANDY RIVER NURSING CARE, ET AL.,
Plaintiffs, Appellants,

v.

AETNA CASUALTY, ET AL.,
Defendants, Appellees.

JUDGMENT

Entered February 25, 1993

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

FRANCIS P. SCIGLIANO, CLERK.

By:_____
Chief Deputy Clerk

(cc: Messrs. Wildfang, Parker, Wessler)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1856

SANDY RIVER NURSING CARE, ET AL.,
Plaintiffs, Appellants,

v.

AETNA CASUALTY, ET AL.,
Defendants, Appellees.

CORRECTED JUDGMENT

Entered March 3, 1993

This cause came on to be heard on appeal from the United States District Court for the District of Maine and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

FRANCIS P. SCIGLIANO, CLERK.

By:_____
Chief Deputy Clerk

(cc: Messrs. Wildfang, Parker, Wessler)

United States Court of Appeals
For the First Circuit

No. 92-1856

SANDY RIVER NURSING CARE, ET AL.,
Plaintiffs, Appellants,

v.

AETNA CASUALTY, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MAINE

[Hon. Morton A. Brody, *U.S. District Judge*]

Before

Selya, *Circuit Judge*,
Coffin, *Senior Circuit Jude*,
and Stahl, *Circuit Judge*.

K. Craig Wildfang with whom *Wood R. Foster, Jr., Anne K. Weinhardt, Sidney St. F. Thaxter, John D. Gleason, Vance K. Opperman, Robert J. Schmit, Patrick N. McTeague,* and *Barnet D. Skolnik* were on brief for appellants.

Richard G. Parker with whom *Paul W. Chaiken, James E. Kaplan, Mark F. Horning, Paul Macri, Fredric W. Yerman, Lewis W. Vafiades, Michael L. McCluggage, Harold J. Friedman, Carl F. Rella, Stanley B. Block, Robert S. Frank, Robert F. Hanson, William A. Montgomery, Michael A. Nelson, James van R. Springer, George Z. Singal, Joseph E. Coughlin, Paul H. Friedman, Randall B. Weill, Alfred C. Frawley, Peter J. Rubin, Lewis V. Vafiades,* and *Lewis A.*

Noonberg were on brief for appellees.

Stephen L. Wessler, Deputy Attorney General, *Francis E. Ackerman*, Assistant Attorney General, and *Thomas D. Warren*, Deputy Attorney General, on brief for the State of Maine, amicus curiae.

February 25, 1993

COFFIN, *Senior Circuit Judge*. Plaintiffs are a group of Maine employers who claim that the defendant insurance companies illegally conspired to fix prices and conduct a boycott in a successful effort to coerce the state legislature into permitting higher rates for workers' compensation insurance.[1] The district court granted summary judgment for defendants based on the doctrines established in *Parker* v. *Brown*, 317 U.S. 341 (1943), and *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 127 (1961).[2] The court concluded that plaintiffs' claimed damage—the additional cost of their insurance—was attributable to that legislation rather than to the alleged conspiracy, and that, consequently, federal antitrust laws provide no relief.

On appeal, plaintiffs contend that the court erred both in construing their claims and in immunizing defendants' actions. After carefully reviewing the record and pertinent caselaw, we conclude that the district court properly granted summary judgment for defendants. Although we depart somewhat from the court's analysis—finding that the alleged conspiracy

---

[1] Plaintiffs sued fifteen insurance companies and the National Council on Compensation Insurance (NCCI), a voluntary association of insurers that is a state-licensed rating organization.

[2] In the briefest summary, these doctrines exempt from antitrust liability anticompetitive actions attributable to the state, *Parker*, 317 U.S. at 350-52, and political activity by individuals seeking to influence the passage or enforcement of laws, *Noerr*, 365 U.S. at 136-40.

constituted a *per se* violation of the Sherman Act, 15 U.S.C. § 1 — we affirm the court's holding that the *Parker* doctrine bars plaintiffs' requested relief.[3]

I.[4]

Workers' compensation insurance has long been an extremely sensitive issue in Maine. Regulation is strict. All employers who do not self-insure are required to purchase such insurance. Insurers are "required by Maine Law to charge only those rates for workers' compensation insurance which have been filed with, and approved by, the Maine Superintendent of Insurance in conformance with Maine Law." Complt. ¶ 32. The businesses and the insurers both have been dissatisfied with the system.

At least since 1981, NCCI and its members have taken affirmative steps to challenge the allowable rates as unfairly low. They have sought review of the Superintendent's rate decisions in court, *see, e.g., National Council on Compensation Ins.* v. *Superintendent of Ins.*, 481 A.2d 775 (Me. 1984) (affirming Superintendent's disapproval of a requested rate increase of 27.5%; NCCI had claimed that statistical evidence showed that a 110% increase was warranted), and consistently have lobbied for legislation that would reduce statutory benefits and permit insurers to charge higher rates. Neither their litigation nor lobbying proved successful during the period relevant to this litigation.

Indeed, to the contrary, the Maine Legislature in 1985 enacted the "Workers' Compensation Competitive Rating Act," which directed that workers'

---

[3] The complaint sought injunctive relief in addition to damages, but neither the district court nor the parties devoted attention to this request. We note only that, in light of our analysis, we see no basis upon which plaintiffs may be awarded injunctive relief.

[4] We draw heavily from the district court's well-stated description of the recent history of the Maine workers' compensation system.

compensation insurance rates be rolled back at least 8% and frozen at that level until 1987. Me. Rev. Stat. Ann. tit. 24-A, §§ 2331-2357 (1985) (repealed). Under the Act, insurers were prohibited from requesting rate increases exceeding 10% in 1987, 1988 and 1989. *Id.* at § 2355. In addition, the 1985 Act declared that it was intended, *inter alia*:

> 1. . . . To prohibit price fixing agreements and other anticompetitive behavior by insurers. . . .
> 3. . . . To promote price competition among insurers . . . .

Id. at § 2332.

The insurers challenged the 1985 act in court. Although the Maine Superior Court determined that the rate ceilings were so low that they were confiscatory, the court held that the ceilings were not unconstitutional because insurers were free to withdraw from the market for workers' compensation insurance in Maine. *National Council on Compensation Ins.*. v. *Superintendent of Ins.*., CV-85-459 (Sup. Ct. May 14, 1987) (Alexander, J.), *appeal dismissed*, 538 A.2d 759 (Me. 1988) (dismissed as moot because 1987 legislation repealed 1985 Act).

In this lawsuit, plaintiffs assert that defendants, unable to achieve their goals legally, resorted to improper means. Plaintiffs contend that defendants allegedly conspired to fix prices at a higher-than-lawful rate and to conduct a boycott of the Maine workers' compensation market to induce legislation authorizing rate increases. As early as 1986, plaintiffs claim, defendants jointly began refusing to insure employers voluntarily, requiring them to obtain workers' compensation coverage through the "residual" or "involuntary" system. Every insurer authorized to write workers' compensation policies in Maine is required by state law to participate in the "involuntary market" and, thus, to share the underwriting responsibility for

employers otherwise unable to obtain coverage.[5] The conspirators allegedly increased the pressure on the Maine legislature to act when, between late summer and October 1987, virtually all workers' compensation insurers in Maine prepared to withdraw from the state.

To avert the crisis that would occur if all workers' compensation insurers left, Governor John McKernan convened a special session of the legislature devoted exclusively to reviewing and reforming Maine's workers' compensation system. In short order, the legislature approved the "Workers' Compensation Rating Act" (deleting the word "competitive" that had been in the title of the 1985 Act), Me. Rev. St. Ann. tit. 24-A, §§ 2361-2374 (West 1990 and 1992 Supp.). The 1987 Act removed the limitations on rate increases contained in the 1985 Act. It authorized NCCI to act as agent for its member insurance companies by submitting joint rate proposals on their behalf to the Superintendent of Insurance, who is the ultimate decisionmaker on the rates insurers may charge. Insurers are permitted, however, to deviate below the rate approved by the Superintendent.

In 1988, 1989 and 1990, the insurers collectively applied for rates beyond the limits allowed in the 1985 Act. Each year, the Superintendent rejected the requested rate increases, but authorized lower increases that still exceeded the 10% caps set by the 1985 legislation. Plaintiffs contend that, as part of the insurers' continuing price-fixing conspiracy, defendants unlawfully agreed to charge only the maximum rate allowed by the Superintendent.

Through this lawsuit, plaintiffs seek recovery of damages in the amount of the increased premiums they have paid since the 1987 Act was passed and defendants began charging higher rates. The district

---

[5] Plaintiffs seem to suggest that the shift of employers from the voluntary to the involuntary market was in some way detrimental to them, but they do not explain how.

court concluded that this relief was barred because the alleged harm was directly traceable to the 1987 legislation and the approval of rate increases by the Maine Superintendent of Insurance. The court relied on the well-established *Parker* principle, *see* 317 U.S. at 350-52, that injury caused by anticompetitive state action is not compensable under the antitrust laws. The court further believed that defendants' actions were protected by the *Noerr* doctrine, *see* 365 U.S. at 136-40, which exempts from antitrust liability the collective efforts of private actors to promote anticompetitive legislation.

Plaintiffs argue on appeal that the district court erred because it mistakenly attributed their asserted injury to state action. They contend that they were harmed not by the legislation itself but by defendants' ongoing conspiracy to obtain and charge higher rates. *Parker*, they insist, is therefore inapplicable. They further assert that *Noerr* provides no immunity for defendants because the alleged conspiracy involved classic anticompetitive economic conduct—a boycott and price-fixing—rather than political activity such as lobbying or petitioning.

Defendants respond that, regardless of the nature of the conspiracy, which they admitted solely for purposes of the summary judgement proceedings, they cannot be assessed damages based on the premium increases authorized by state law. Because that is the only injury for which plaintiffs seek relief, defendants maintain that the district court correctly granted summary judgment.

II.

The issues we face on this appeal are matters of law, and our standard of review is therefore de novo. *Liberty Mutual Ins.. Co.* v. *Commercial Union Ins. Co.*, 978 F.2d 750, 757 (1st Cir. 1992). Although plaintiffs repeated at oral argument a complaint earlier made to

the district court that they had had inadequate time to develop the facts through discovery, we do not see how additional investigation could have affected the summary judgment decision. Defendants have admitted, for purposes of their motion, that they conspired to withdraw from the Maine workers' compensation market. Plaintiffs identify no other possibly discoverable fact that would be material to the legal issues before us. We note, moreover, that they have not appealed the district court's denial of their motion for additional discovery time.

Plaintiffs make a related claim that the district court erred in repeatedly failing to construe their complaint in the light most favorable to them, arguing that this standard of scrutiny—normally applicable to motions to dismiss—applies here because defendants conceded the material factual allegations of the complaint. This claim also is irrelevant to our disposition. As our analysis in the following sections will demonstrate, plaintiffs' appeal fails no matter how liberally their allegations concerning defendants' conspiracy are construed because the specific relief they seek is barred as a matter of law.

III.

We begin our analysis with an aspect of the case that has engendered some confusion, but apparently no real disagreement among the parties. In the concluding paragraph of its opinion, the district court stated that "[t]he defendants' conspiracy to press for legislation permitting them to charge higher rates—which in and of itself caused Plaintiffs no injury—is immune under *Noerr*." Opinion at 22. The State of Maine construed this statement and similar references elsewhere in the opinion as holding that private actors lawfully may employ a concerted economic boycott to influence a legislative determination. Disturbed by this specific holding, the State sought and was granted permission

to file an amicus brief limited to urging that we reverse the ruling.

We have some doubt that the district court intended the broad statement attributed to it by the State. Regardless, at this point, the State's position meets with no opposition from any party. Plaintiffs and defendants all agree that private actors who conduct an economic boycott violate the Sherman Act and may be held responsible for *direct marketplace injury* caused by the boycott, even if the boycotters' ultimate goal is to obtain favorable state action. This view, we find, clearly reflects Supreme Court precedent.

In *Noerr*, the Supreme Court held that the defendant railroads could associate for the purpose of waging a publicity campaign designed to secure legislative action harmful to the truckers with whom they competed, without implicating the Sherman Act prohibition against combinations in restraint of trade. 365 U.S. at 136-37. The Court observed that, in a representative democracy, individuals must have the ability to "freely inform the government of their wishes," *id.* at 137, and they are permitted to do so even if their motives are entirely anticompetitive, *id.* at 139-40. Any other conclusion "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act." *Id.* at 137.

Noerr does not protect from antitrust liability, however, *all* actions designed to influence government. The Court has made it clear that certain "combinations normally held violative of the Sherman Act," *id.* at 136, including price-fixing agreements and boycotts, are not "outside the coverage of the . . . Act simply because [their] objective was the enactment of favorable legislation," *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990). *See also Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 503-04 (1988); *Noerr*, 365 U.S. at 136. In other words, a

classic economic restraint of trade is actionable even if its primary purpose is political.

This limitation on the *Noerr* doctrine was fully explored in *Trial Lawyers*, a case closely analogous to the one before us. *Trial Lawyers* involved a boycott organized by members of the District of Columbia criminal defense bar. The attorneys agreed not to accept any court appointments to represent indigent criminal defendants in order to force the District's City Council to raise the hourly rate of pay for court-appointed criminal defense work. The Supreme Court held that the boycott constituted a "plain violation of the antitrust laws," 493 U.S. at 428, and that "[o]ur decision in *Noerr* in no way detracts from this conclusion," *id.* at 424. *Noerr*, the Court emphasized, involved "mere attempts to influence the passage or enforcement of laws," *id.* (quoting *Noerr*, 365 U.S. at 135), not an actual restraint on price and output, *id.* at 423. The *Noerr* exception to antitrust liability thus was inapplicable to the lawyers' boycott. *Id.* at 428.

The district court here sought to distinguish *Trial Lawyers* from the case before it, at least in part, because the anticompetitive conspiracy there was directed at the government, the District of Columbia City Council, as a commercial participant. Opinion at 20-21. The court appeared to view the government's role as a purchaser as significant to the Supreme Court's conclusion that *Noerr* immunity was unavailable:

> The goal of the trial lawyers' conspiracy was to inflict economic pain on the government, forcing it to pass legislation. In this case, however, the Defendants' alleged conspiracy was not intended to harm the government as a commercial participant in the marketplace, only to prompt it to pass anticompetitive legislation.

Opinion at 21. Consequently, the district court seemed to say, the conspiracy in this case was protected by *Noerr*.

Trial Lawyers does not establish a "government-as-market-participant" exception to *Noerr*. What was significant about the concerted activity there was not that the government was the purchaser, but that the defendants had sought to influence the government through an economic boycott that directly affected the marketplace by, *inter alia*, constricting the supply of lawyers available to represent indigent criminal defendants. The Court emphasized that *Noerr* provides immunity when the alleged restraint of trade is imposed *by the government* as the intended *consequence* of the defendants' concerted activity. It is inapplicable when private actors impose the challenged restraint of trade through a boycott or other traditionally unlawful economic measure, even when the boycott's sole purpose is to instigate favorable governmental action.

Whether the boycotted purchaser is the government or a private individual is irrelevant; the significant factor is direct market effect.

> The restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted. In *Noerr*, the desired legislation would have created the restraint on the truckers' competition; in this case the emergency legislative response to the boycott put an end to the restraint.

Trial Lawyers, 493 U.S. at 425.

Here, too, the defendants allegedly employed an economic boycott that beyond doubt " 'constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act,' " *id.*, 493 U.S. at 422 (quoting Court of Appeals, 856 F.2d 226, 234 (1988)). Had these or other plaintiffs sought injunctive relief during the boycott period, or had they sought damages based on the boycott's direct market effects (such as reduced availability of insurance or higher prices resulting from

reduced competition during the boycott period), they would have had a viable antitrust claim. These plaintiffs, however, explicitly have disclaimed any request for relief based on injury occurring while the boycott was in place, before the Maine Legislature passed the 1987 Act.[6]

In all likelihood, it was the plaintiffs' decision to pursue only post-legislation damages that influenced the district court to state broadly that defendants were immune from liability. The court correctly recognized that a conspiracy to press for legislation permitting defendants to charge higher rates was permissible unless it was implemented through an actual restraint of trade. Because plaintiffs sought no direct market damages from the boycott, the court evidently treated the boycott not as a prohibited restraint of trade but as a lobbying effort equivalent to the unethical and deceptive publicity campaign waged by the defendants in *Noerr*.

In so doing, the court may have overstated its holding unintentionally, permitting the inference drawn by the government that the boycott itself was being held immune under *Noerr*. As we have explained, such a holding would conflict with Supreme Court caselaw. Defendants' boycott plainly constituted a *per se* violation of the Sherman Act even though plaintiffs seek no marketplace damages resulting from it.

IV.

The central issue before us is whether plaintiffs may recover damages based on the higher rates they have paid for workers' compensation insurance since the enactment of the 1987 legislation. The district court ruled that the state action doctrine *Parker* v. *Brown*, 317 U.S. 341, precluded such relief because the rate

[6] We offer no view as to whether plaintiffs would have been able to prove damages from a constriction of supply or absence of price competition resulting from the conspiracy.

increases were authorized by the Maine Legislature, and adopted and implemented by the state's Superintendent of Insurance.

In *Parker*, "[r]elying on principles of federalism and state sovereignty, [the Supreme Court] held that the Sherman Act did not apply to anticompetitive restraints imposed by the States 'as an act of government.' " *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1349 (1991) (quoting *Parker*, 317 U.S. at 352). The district court believed that the actions of the legislature and Superintendent of Insurance superseded defendants' previous conduct, rendering the rate hikes "an act of government" immune under *Parker* rather than an injury inflicted by defendants' conspiracy.

Plaintiffs offer two reasons why the *Parker* doctrine does not bar the relief they seek. First, in an argument more heavily utilized in the district court, plaintiffs maintain that the defendants' use of unlawful activity to coerce the favorable legislation makes the *Parker* doctrine inapplicable. Because the legislature unlawfully was pressured to act, they contend, the statute may not be used to insulate defendants from responsibility. Second, plaintiffs argue that it was not the legislation simply permitting rate hikes that harmed them, but the defendants' longstanding conspiracy to charge the maximum possible rates.

Neither of these arguments is persuasuive. The first contention, that the defendants' coercive conduct circumscribes the effect of the legislature's actions, is directly contradicted by Supreme Court precedent. In a recent case, *Omni*, 111 S. Ct. at 1352, the Court reaffirmed its previously stated determination that *Parker* immunity turns on *who* imposed the challenged restraint, not *why*:

> "[W]here the action complained of . . . was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking

the action."

Id. at 1352-53 (quoting *Hoover v. Ronwin*, 466 U.S. 558, 579-80 (1984)).

Omni rejected a proposed conspiracy exception to the *Parker* doctrine that would have denied immunity when government employees were involved as conspirators with private actors in the challenged restraint of trade. The Court considered possible methods for defining a conspiracy exception, including an approach that would make *Parker* inapplicable only if, in connection with the governmental action in question, bribery or some other violation of state or federal law were established. *Id.* at 1353. It ultimately concluded that any such limitation would be, at best, an imprecise way to determine which anticompetitive state actions should be exempted from antitrust liability.

> Such unlawful activity has no necessary relationship to whether the governmental action is in the public interest. A mayor is guilty of accepting a bribe even if he would and should have taken, in the public interest, the same action for which the bribe was paid . . . To use unlawful political influence as the test of legality of state regulation undoubtedly vindicates (in a rather blunt way) principles of good government. But the statute we are construing is not directed to that end.

Id.

The holding in *Omni* fully embraces plaintiffs' tendered coercion exception. Allegations of coercion, like those of conspiracy, implicate only the off-limits issue of the legislators' motivation. *Omni* reaffirms that the state action protection provided by *Parker* is not vulnerable to such claims.

Plaintiffs' second theory bears down more closely on the 1987 legislation. Because the statute does not

mandate that insurers charge the maximum rates allowed by the Superintendent, but merely eliminated the caps imposed by the repealed 1985 Act, plaintiffs maintain that the higher rates by which they were damaged resulted from defendants' conspiracy to charge the maximum rates and not from the legislature's adoption of the statute. We detect two problems with this argument.

First, the manner in which plaintiffs asserted this theory before the district court differed in a subtle, yet significant, way from the approach adopted on appeal. Throughout the proceedings before the district court, plaintiffs emphasized that they alleged injury from a conspiracy initiated in the summer and fall of 1987 to violate the *1985* legislation, which prompted open competition in their workers' compensation market.

> Plaintiffs do not claim that they were injured by actions mandated by the 1987 legislation. Indeed, plaintiffs allege not only that the conspiracy began before the 1987 legislation was even enacted, but that the *objective* of the conspiracy was that very enactment. Plaintiffs in fact allege that they were injured by defendants' conspiracy to violate the *1985* legislation. It is therefore the 1985 legislation against which state action claims must be tested.

Plaintiffs' Memorandum in Opposition to Defendants' Joint Motion for Summary Judgment, at 18 n.11 (emphasis in original).

At oral argument on the summary judgment motion, plaintiffs again asserted that it had been unlawful for the defendants to conspire to increase prices while the 1985 legislation governed. *See* App. at 720. When the district court asked why the defendants' actions were not protected in light of their "acting within the framework set up by the legislature in the enactment of rates," plaintiffs' counsel responded that "one needs to be clear on the time frame." *Id.* at 729. He continued:

> At the time the conspiracy was hatched and effectuated in summer and fall of 1987, the policy of the State of Maine was open competition in workers' comp. The policy of the State of Maine was, "Go compete with each other."
>
> And these defendants had a private agreement, in effect, not to compete and to boycott consumers and the state.

Id.

Thus, the argument to the district court focused on conduct leading up to the 1987 act: the defendants unlawfully conspired to charge higher rates, and obtained permission to do so through unlawful means, making the new rates wholly a result of defendants' unlawful conduct. Moreover, the plaintiffs argued, even though the specific harm for which they sought damages did not occur until after the law was changed and higher rates authorized, defendants had to be held responsible so that their past illegal conduct would not be immunized retroactively. Failing to hold them liable, plaintiffs argued,

> would lead to the anomalous result that *unsuccessful* boycotts (*i.e.* boycotts which do not successfully coerce governmental action) would be antitrust violations, but that *successful* boycotts (*i.e.* boycotts to which government succumbs in order to avoid chaos or disaster) would be immunized.

Plaintiffs' Memorandum in Opposition, at 35-36 (emphasis in original) (footnote omitted).[7]

The argument on appeal unquestionably adds a new dimension. Plaintiffs now contend that, after passage of the 1987 act, defendants again violated antitrust

---

[7] As we made clear in Section III, the response to this argument is that unlawful boycotts with direct marketplace impact will result in accountability for the *market* injury, regardless of their success in inducing governmental action.

laws by conspiring to refuse to sell below the new maximum rates established by the Superintendent of Insurance. That agreement is not entitled to state action immunity, plaintiffs suggest, because the provision in the 1987 Act allowing independent ratesetting demonstrates that state policy still favors competition. Consequently, plaintiffs contend that defendants should be held liable for the rate increases.[8]

This link between plaintiffs' conspiracy allegation and the 1987 Act never was offered to the district court; indeed, as noted above, plaintiffs expressly disclaimed the new statute's relevance to the *Parker* issue. The conspiracy achieved success, plaintiffs asserted, when the State enacted the law allowing higher premiums. *See* Memorandum in Opposition to Summary Judgment, at 2-3 (quoted in District Court Opinion, at 3). Led by these arguments, the district court never considered whether the defendants could be held responsible for the rate increases—despite authorization of those rates by the state—if they had conspired not to deviate below the maximum rate.

Whether plaintiffs sufficiently preserved this argument need not unduly detain us, however, because the theory is in any event unavailing. When the legislature enacted the 1987 statute, it did not simply eliminate the ceiling on the permissible rates for workers' compensation insurance, but it also moved away from the state's previous pro-competitive policy

---

[8] We note that some portions of plaintiffs' appellate brief retain the focus on the 1985 legislation:

> Plaintiffs do not challenge the Defendants' "participation in ratesetting proceedings" in 1988 after the 1987 legislation was enacted repealing the 1985 Competitive Rating Act. What Plaintiffs challenge is Defendants' *conspiracy* begun in 1986 and 1987, at a time when Maine law specifically prohibited such conspiracies, to constrict supply, to fix prices, and to boycott consumers *in order to coerce the removal of the existing price ceiling.*

Plaintiffs' Brief at 31 (additional emphasis added).

toward ratesetting. The 1987 Act provided for joint rate filings[9] and, in our view, it must be construed as implicity condoning an agreement among insurers to charge the rates they jointly propose, subject to approval by the Superintendent. When insurers work together within a state regulatory system to advocate rates that they all presumably believe are appropriate for workers' compensation insurance, we fail to see how it could be illegal price fixing for them also subsequently to agree to charge the rates allowed by the state, particularly when the approved rates fall below the jointly proposed rates.

At a minimum, it must be lawful for insurers to agree to charge the approved rate where, as here, the Superintendent's obligation is to establish rates that are "[j]ust and reasonable" and "[b]ased only on a just and reasonable profit." Me. Rev. Stat. Ann. tit. 24-A, § 2363 (7) (A) (1), (2). Thus, while the statute stipulates that these rates set the upper limit on permissible charges, *id.* at § 2362, the expectation clearly is that the Superintendent's rates are the ones that generally will be appropriate for, and thus used by, all insurers. In this context, the legislature evidently viewed the sort of "price fixing" alleged by plaintiffs as benign; notably absent from the 1987 statute is a provision contained in the 1985 Act prohibiting insurers from agreeing "to adhere to or use a rate or rating plan," *id.* at § 2347 (2) (1985) (repealed).

Plaintiffs rely on the provision allowing downward rate deviation to support their claim that defendants'

---

[9] It did so somewhat indirectly through repeal of the 1985 Act, which meant that the joint ratemaking provisions that then existed for all lines of insurance sold in Maine again were applicable to workers' compensation insurance. In 1989, the legislature revised the general insurance ratemaking system to encourage competition, leaving the joint ratemaking provisions applicable *only* to the workers' compensation providers. *Compare* Me. Rev. Stat. Ann. tit. 24-A, § 2309 (West 1990) *with* Me. Rev. Stat. Ann. tit. 24-A, § 2309 (West Supp. 1992).

conspiracy to charge a uniform rate was unauthorized and, consequently, not immunized under *Parker*. But the fact that insurers *may* charge less than the approved rate is of little significance when it is juxtaposed with the uniform approach to ratemaking that is the overriding characteristic of the reformed system. On its own, the permissive provision certainly does not establish a state policy favoring competitive pricing. Moreover, the Supreme Court, in *Southern Motor Carriers Rate Conference* v. *United States*, 471 U.S. 48 (1985), explicitly held that *Parker* immunity is available to private parties acting pursuant to a regime of collective ratemaking that is authorized, though not compelled, by the state.

Southern Motor Carriers involved a challenge to the joint activities of motor common carrier rate bureaus in four states where carriers were permitted to agree on rate proposals before their submission to state agencies. In the course of its decision, the Court reaffirmed the two-pronged test set forth in *California Retail Liquor Detailers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), for determining whether the anticompetitive conduct of private parties within a state regulatory scheme is shielded from the antitrust laws:

> First, the challenged restraint must be " 'one clearly articulated and affirmatively expressed as state policy.' " Second, the State must supervise actively any private anticompetitive conduct.

471 U.S. at 57 (citations omitted).

The justices then considered whether the actions of a private party can be attributed to a clearly articulated state policy, within the meaning of the *Midcal* test's first prong, even if the state does not compel the challenged anticompetitive activity. *Id.* at 59-60. The Court observed that a compulsion requirement would reduce the range of alternatives available to a state that wished to regulate a given industry—thereby negatively affecting principles of federalism—while

perhaps also causing *greater* restraints on trade—thereby impairing the goal of the antitrust laws to ensure "unfettered competition in the marketplace," *id.* at 61. Declining to "believe that Congress intended to resolve conflicts between two competing interests [federalism and competition] by impairing both more than necessary," *id.*, the Court concluded that "a state policy that expressly *permits*, but does not compel, anticompetitive conduct may be 'clearly articulated' within the meaning of *Midcal*," *id.* (emphasis in original).

In this case, it is manifestly clear that defendants' ratemaking activities meet both prongs of the *Midcal* test. The new scheme was adopted by the legislature, fulfilling the state policy prong of the test, and the Superintendent's involvement in reviewing and modifying the insurers' proposed rates unquestionably meets prong two's requirement of active state supervision. Indeed, plaintiffs expressly acknowledge that *Midcal* is satisfied with respect to the ratemaking proceedings. *See* Reply Brief, at 19 n.15. Plaintiffs instead hammer on defendants' "converting the results of that ratemaking proceeding, *i.e.* a schedule of *maximum* or ceiling prices, into a *private* agreement to uniformly charge the maximum price, and to refuse to deal at prices below that level." *Id.* (emphasis in original).

This argument misfires because it fails to take into account the changed landscape. Even if defendants violated the Sherman Act in the late summer and early fall of 1987 by conspiring to raise the maximum prices they could charge beyond those permitted by the 1985 Act, it does not necessarily follow that it was unlawful for them to agree to charge the rate subsequently approved by the Superintendent pursuant to the 1987 Act. Once the legislature acted in November 1987, defendants' conduct had to be assessed in light of the new state policy and procedures. As we have discussed, the 1987 Act endorsed cooperative ratesetting and

anticipated that most, if not all, insurers would charge the newly authorized rates. Accordingly, the damages sought by plaintiffs—the differential between the rates allowed under the 1985 Act and the new rates charged by defendants under the 1987 Act—must be viewed as a product of state action. The district court therefore correctly concluded that, under *Parker*, defendants may not be held accountable for this claimed injury.

V.

In summary, we hold that the economic boycott and price fixing conspiracy allegedly conducted by defendants in the summer and early fall of 1987 constituted a *per se* violation of the Sherman Act, and did not fall within the *Noerr* doctrine's protection for concerted activity designed to elicit favorable legislation. But plaintiffs have not sought damages for direct marketplace injury inflicted by that conspiracy.

The monetary damages alleged by plaintiffs—the amount of increase in their workers' compensation insurance rates under the 1987 statutory scheme allegedly coerced by defendants—are not recoverable from the insurers. Because the state authorized collective ratemaking and closely supervised the setting of higher rates, any agreement among defendants to charge the maximum authorized rates is permissible, and defendants are immune from liability for the increase under the *Parker* doctrine.

Affirmed.

United States District Court
District of Maine

SANDY RIVER NURSING CARE CENTER, et al.,

Plaintiffs,

v.

Civ. No. 91-0210-B

NATIONAL COUNCIL ON COMPENSATION INSURANCE, et al.,

Defendants.

ORDER AND MEMORANDUM OF OPINION

This antitrust action is before the Court on Defendants' motion for summary judgment. The Plaintiffs allege that they were injured by workers' compensation rate increases approved by the Maine Superintendent of Insurance after the Maine legislature enacted a law in 1987 permitting insurers to apply for rate hikes exceeding ceilings allowed under prior law. The Plaintiffs complain that the 1987 legislation was enacted because insurers successfully conspired to pressure the Maine legislature by threatening to withdraw from the workers' compensation insurance market. The Plaintiffs seek to recover damages for the increased premiums they have paid since the 1987 legislation was passed and higher workers' compensation insurance rates were approved. Plaintiffs acknowledge that the premiums charged by the insurers were lawful, at least insofar as they were authorized by the legislature and approved by the Superintendent of Insurance. Because federal antitrust laws generally neither prohibit private actors from collectively seeking favorable rate legislation from States nor provide relief to persons proximately injured

by legislation passed by States, Defendants' motion is *GRANTED.*

I.

Background

A. *The Complaint*

Thirteen Maine businesses filed this class action[1] on September 12, 1991, against the National Council on Compensation Insurance ("NCCI"), an insurance rating organization, and fourteen named insurance companies together with their subsidiaries and affiliates.[2] The Plaintiffs' four count complaint alleges that "the defendants entered into a conspiracy to fix the price of workers' compensation insurance sold in Maine [Count I]; and to effectuate that conspiracy by acting and agreeing to boycott, coerce and intimidate Maine employers [Count II] and Maine insurers (Count III]" in violation of federal antitrust law. Plaintiffs'

---

[1] The Plaintiffs seek to represent

> all employers (excluding defendants and co-conspirators, including any subsidiary or affiliate thereof and excluding those employers who were self-insured) doing business in the State of Maine required by Maine law to carry workers' compensation insurance coverage between November 20, 1987 and the present date (hereinafter "the damage period") [who] purchased policies of workers' compensation insurance from one or more of the named defendants including any subsidiary or affiliate thereof or from one or more of defendants' co-conspirators, or from any insurance company utilizing the higher rates for workers' compensation insurance which resulted from defendants' unlawful conspiracy.

Cmplt. ¶ 24(a).

By agreement of the parties, consideration of the Plaintiffs' motion for class certification was deferred until after a decision on Defendants' motion for summary judgment issues.

[2] The Plaintiffs filed a "First Amended Complaint" on December 4, 1991, which differs from the original complaint only in that it adds The Hartford and its affiliates and subsidiaries as defendants.

Memorandum in Opposition to Defendants' Joint Motion for Summary Judgment at 2. Count IV of the complaint, which the Plaintiffs discussed in neither of their memoranda nor at oral argument, charges that Defendants' conduct violated Maine antitrust law as well.

Plaintiffs indicate that the true object of the suit is "Defendants' private, unsupervised conspiracy to extract higher prices from Maine employers by utilizing their [i.e., Defendants'] collective economic power to . . . coerce and intimidate . . . the State of Maine." *Id.* at 2-3. According to the Plaintiffs, "Defendants entered into the conspiracy . . . with the objective of coercing the enactment of favorable legislation to permit these Defendants to charge the higher prices they had agreed upon." *Id.* at 3.

B. *Maine Workers' Compensation Market*

Workers' compensation insurance has long been — and remains — an extremely sensitive political issue in Maine. Regulation is strict. All employers who do not self-insure are required to purchase workers' compensation insurance. Insurers are "required by Maine law to charge only those rates for workers' compensation insurance which have been filed with, and approved by, the Maine Superintendent of Insurance in conformance with Maine Law." Cmplt. ¶ 32.

Neither the insurers nor the insureds are happy with the regulatory regime. Businesses believe that rates are too high. Insurers believe that rates are too low. Consequently, workers' compensation is a perennial political battleground.

According to the Plaintiffs, NCCI and the insurance industry's dissatisfaction with the rates insurers were permitted to charge dates at least back to 1981. Plaintiffs' Memo at 5 (citing *National Council on Compensation Ins. v. Superintendent of Ins.*, 481 A.2d 775 (Me. 1984) (affirming Superintendent's disapproval

of a requested rate increase of 27.5%; NCCI had claimed that statistical evidence showed that a 110% increase was warranted)). NCCI and its members have consistently lobbied for legislation permitting them to charge higher rates and lowering statutory benefits. Between 1981 and 1985, their efforts were unsuccessful.

C. *The 1985 Legislation*

In 1985, the Maine legislature enacted the "Workers' Compensation Competitive Rating Act," 1985 Me. Laws Ch. 372 ("1985 Act"), rolling back workers' compensation insurance rates 8% and freezing rates at that level until 1987. Under the 1985 Act, insurers were prohibited from requesting rate increases exceeding 10% in 1987, 1988, or 1989. 24-A M.R.S.A. § 2355 (1985). In addition, the 1985 Act declared that it was intended, *inter alia*:

> 1 . . . To prohibit price fixing agreements and other anti-competitive behavior by insurers. . . .
> 3 . . . To promote price competition among insurers. . . .

24-A M.R.S.A. § 2332 (1985).

The rate reduction and caps on future increases greatly displeased the insurance industry. The insurers attacked the 1985 Act in court, but their litigation efforts were no more successful than their lobby efforts. Although the Maine Superior Court determined that the rate ceilings were so low they were confiscatory, the court held that the ceilings were not unconstitutional because insurers were free to withdraw from the market for workers' compensation insurance in Maine. *National Council on Compensation Ins. v. Superintendent of Ins.*, CV-85-459 *et seq.* (Sup. Ct. May 14, 1987) (Alexander, J.), *appeal dismissed,* 538 A.2d 759 (Me. 1988) (appeal dismissed as moot because legislation passed in November 1987 repealed 1985 Act).

According to the Plaintiffs, "beginning in the late

In 1988, 1989, and 1990, workers' compensation insurers applied for rate hikes exceeding the limits set by the 1985 Act and repealed by the 1987 Act. Each year, the Superintendent of Insurance rejected the rate increases requested by the insurers, but authorized lower increases. Affidavit of Joseph A. Edwards at ¶¶ 19, 29.

E. *The Nature and Source of Plaintiffs' Injury*

The Plaintiffs do not allege that the insurers charged unlawful rates. *See* Cmplt. ¶ 32. Nor do the Plaintiffs contend that the insurers refused to sell them insurance. The Plaintiffs do not allege that they were directly injured by the Defendants' alleged conspiracy. And the Plaintiffs do not allege that they were injured *before* the legislature repealed the 1985 Act and the Superintendent of Insurance approved higher rates. Rather, the Plaintiffs complain that they were injured becaused they have been required to pay "workers' compensation insurance premiums and charges which [were] substantially higher than they would have been in the absence of Defendants' unlawful conspiracy." Complt. ¶ 55. Plaintiffs' alleged injury is directly traceable to the 1987 legislation and to the approval of rate increases by the Maine Superintendent of Insurance.

II.
Summary Judgment Standard

The applicable standard is familiar. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

We need not linger long over Plaintiffs' arguments that this is an inappropriate case for summary

summer of 1987 and continuing through October, 1987 'virtually all insurers in the Maine Workers' Compensation Market' " prepared to withdraw from Maine. Plaintiffs' Memo at 9 (quoting affidavit of Sidney St.F Thaxter, Exhibit A). Significantly injured, insurers responsible for writing over 90% of workers' compensation in Maine filed plans for withdrawal from the state that were approved by the Superintendent of Insurance.

D. *The 1987 Legislation*

In the fall of 1987, facing a "potential crisis," 1987 Me. Laws 2585, Governor John McKernan convened a special session of the legislature devoted exclusively to reviewing and reforming Maine's workers' compensation system. With the State's attention focused on this issue, the legislature approved an Act to Improve the Maine Workers' Compensation System, 1987 Me. Laws Ch. 559 ("1987 Act"). The insurers recovered ground they had lost in 1985. The 1987 Act removed the limitations on rate increases contained in the 1985 Act. The 1987 Act also permitted NCCI to act as an agent for its members by submitting joint rate proposals on behalf of insurers, deemphasizing the role price competition played under the 1985 Act.

Under the 1987 Act, as under prior law, rates require state approval. "The Superintendent of Insurance must approve . . . workers' compensation insurance rates in an annual ratemaking proceeding . . . The proceeding is adjudicatory in nature and is conducted in accordance with [the Maine Administrative Procedure Act]." *Maine AFL-CIO v. Superintendent of Ins.*, 595 A.2d 424, 426 (Me. 1991) (Brody, J.). Testimony is taken, and interested parties are permitted to participate. The Superintendent of Insurance may accept the rates proposed or set them at a "just and reasonable level." *Id.* There is no "negative option" permitting new rates to go into effect if the Superintendent fails to act.

judgment. The Plaintiffs made no serious effort in their memoranda of law to identify any controverted issues of material fact. Indeed, at oral argument, Plaintiffs conceded that there are no material facts in dispute. Transcript of Hearing on Motion for Summary Judgment at 21 (April 23, 1992). In the absence of any disputed issues of material fact, this Court turns to the legal issues raised by this case.[3]

III.

Parker/Noerr Immunity

The dispositive issues are whether federal antitrust law provides a remedy to plaintiffs who allege that

---

[3] Plaintiffs' memoranda of law alluded to, in the text and in footnotes, a number of arguments that were never developed. Although Plaintiffs raised none of these arguments at oral argument, the Court will address each briefly.

Plaintiffs raised three *pro forma* objections to Defendants' motion for summary judgment. The Court notes simply that there are no issues of "motive and intent" in this case because the Defendants have admitted, for the purposes of this motion, that they conspired to withdraw from Maine; that this Court is not required to make any credibility determinations in deciding this motion; and that summary judgment is not an extreme and disfavored procedural device but rather is expressly designed to end cases in which the material facts are undisputed and one party is clearly entitled to judgment as a matter of law.

Plaintiffs also complained that it is too early in the course of discovery for the Court to consider a summary judgment motion. Plaintiffs' Memo at 8 n.5, 14-15. Plaintiffs did not explain how further discovery will improve their likelihood of defeating this motion for summary judgment. Additional discovery will largely be directed at gathering evidence regarding the Defendants' alleged conspiracy to withdraw from the Maine workers' compensation market. Plaintiffs would have to prove the alleged conspiracy if this case proceeded to trial. For purposes of this summary judgment motion, however, Defendants have admitted that they conspired. Furthermore, Plaintiffs agreed to the timing for Defendants' dispositive motion at the initial scheduling conference held in October 1991 knowing that it could be either a motion to dismiss or a summary judgment motion.

they have been injured by anticompetitive state legislation or by the collective efforts of private actors to promote anticompetitive legislation. To answer these questions, the Court must survey the fuzzy boundary between economic and political activity and determine how far across that boundary the Sherman Act reaches under Supreme Court decisions.

The statutory bases for Plaintiffs' suit are the Sherman Act and Clayton Act. The Sherman Act prohibits:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.

15 U.S.C. § 1 (1988). The Clayton Act provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1988).

Although the Sherman Act is over one hundred years-old, its underlying purposes and scope are still a matter of debate. Nevertheless, it is clear that the paramount objective of antitrust law is economic. The Sherman Act was intended to promote competition and to block the formation of monopolies. *Standard Oil Co. v. FTC*, 340 U.S. 231, 249 (1951). A general consensus holds that antitrust law "promote[s] consumer welfare by preserving the free private competitive market system as the principal institution for allocating resources and determining price and output." S. Chesterfield Oppenheim, Glen E. Weston & J. Thomas

McCarthy, *Federal Antitrust Laws* 9 (1981) (citing commentary from diverse sources). The pro-competitive thrust of antitrust law also promotes non-economic "populist" goals. *See, e.g.*, 1 Philip Areeda & Donald F. Turner, *Antitrust Law* ¶ 103 (1978). When economic and social objectives conflict, however, courts generally give priority to economic objectives.[4] Thus, antitrust law is primarily concerned with the interaction of private actors in the economic marketplace.

Not suprisingly, extension of antitrust principles to the political arena is highly problematic. First, the purpose and result of much political activity is to reduce competition and to favor politically influential groups, since regulation may serve private interests as well as the public interest. In politics, a successful conspiracy is called a majority. As the Supreme Court recently noted:

> The fact is that virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners.

City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1352 (1991). Thus, an antitrust challenge alleging an injury resulting from legislation is generally brought in a context in which a legislative

---

[4] According to Areeda and Turner:

> [D]irect legislation is a more effective and more appropriate method of promoting such other objectives. Within any plausible bounds of statutory interpretation, antitrust law can at best make only a marginal contribution to them. Moreover, the weighing and resolution of conflicting interests and objectives would involve the courts in essentially political decisions for which there are no workable legal standards, and would often place them in a regulatory or supervisory role for which they are ill-equipped.

1 Areeda & Turner, *Antitrust Law* ¶ 105.

body has determined that the pro-competitive policy of antitrust laws ought to be displaced.

Second, application of antitrust law to political activity may conflict with other, more fundamental, values. It is a basic premise of the American system of representative government—enshrined in the Free Speech and Petition Clauses of the First Amendment —that concerted efforts to influence legislation ought to be permitted, regardless of motive.

> The right of the people to inform their representatives of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.

Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 139 (1961) (holding that a deliberately deceitful publicity campaign run by railroads that both promoted anticompetitive legislation and directly injured competing truckers is a form of political activity not prohibited by the Sherman Act). And, in a dual system of government, federal courts may not blithely apply federal antitrust law to invalidate state regulatory action, even if it is anticompetitive. *Parker v. Brown*, 317 U.S. 341, 352 (1943).

Third, antitrust laws are at best a blunt means of regulating political conduct. The antitrust laws do not provide a code of ethics for participation in the political process. *Noerr*, 365 U.S. at 140. "The proscriptions of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena," *Id.* at 141. Rather, limits on political behavior are to be found in legislation which deals explicitly with the evil sought to be eradicated. *Omni*, 111 S. Ct. at 1353 (citing the Hobbs Act, 18 U.S.C. §

1651 (prohibiting bribery)). *See also, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding limits on campaign contributions).

Antitrust law extends into the political realm in two limited circumstances: First, when the government is a commercial participant in a transaction and the anticompetitive conspiracy is directed at the government as a purchaser. *See, e.g., Omni*, 111 S. Ct. at 1351; *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). Second, when the "political activity" of a group of private actors is a mere sham which is not genuinely intended to influence legislation but only to injure competitors or consumers directly. *See, e.g., Omni*, 111 S. Ct. at 1354-55; *Noerr*, 365 U.S. at 144.

The Supreme Court first considered whether the Sherman Act applies to anticompetitive state legislation almost fifty years ago. In *Parker v. Brown*, 317 U.S. 341 (1943), a producer and packer of raisins challenged the California Agricultural Prorate Act ("Prorate Act") under the Sherman Act.[5] The Prorate Act "authorize[d] the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers." *Id.* at 346. Although the program was virtually run by the producers themselves, the Supreme Court curtly rejected the antitrust challenge, holding that there is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350. According to the Court:

It is the state which has created the machinery for

---

[5] The producer also challenged the Prorate Act under the Agricultural Marketing Agreement Act of 1937, as amended, and the Commerce Clause.

> establishing the prorate program. Although the organization of the prorate zone is proposed by producers, and a prorate program . . . must also be approved by referendum of producers, it is the states, acting through the Commission, which adopts the program and which enforces it . . . .

Id. at 352. Under *Parker*, it is clear that a plaintiff may not recover from a state for injuries caused by anticompetitive state legislation.

It is also clear that private actors who participate in ratesetting proceedings under anticompetitive state regulatory regimes are also entitled to "state action" immunity under *Parker* if state law articulates a clear and affirmative policy to allow anticompetitive conduct and the state actively supervises the anticompetitive conduct undertaken by the private actors. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Co.*, 445 U.S. 97, 105 (1980); *see also FTC v. Ticor Title Ins. Co.*, No. 91-72, 1992 U.S. LEXIS 3544 at *17 (June 12, 1992); *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 56-57 (1985). During the relevant time period—after the 1987 legislation was enacted and the Defendants collaborated to propose the rate increases that allegedly injured the Plaintiffs—both prongs of the *Midcal* test were satisfied. The 1987 legislation indisputably created a regulatory regime in which uniform rates were required or authorized, and the Court is satisfied that the Superintendent of Insurance actively supervised the ratesetting process. The Superintendent of Insurance held adjudicatory hearings each year to review the rate proposals submitted by insurers; and each year, after thorough review, the Superintendent approved rate increases smaller than those the insurers requested. "[T]he State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private

parties" which the state rubberstamped or failed to evaluate. *Ticor*, 1992 U.S. LEXIS 3544, at *22. *See also Patrick v. Burget*, 486 U.S. 94, 100-101 (1988).

Approximately twenty years after deciding *Parker*, the Supreme Court addressed a closely related issue: whether a private actor can sue another private actor for seeking to influence the passage of anticompetitive legislation. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), a group of truckers sued a group of railroads for running a deceptive publicity campaign that was designed to foster the adoption of laws that benefitted railroads and harmed truckers. The publicity campaign had the collateral—and not unintended—effect of injuring truckers' reputation with shippers. The Court first summarized the state action doctrine under *Parker*:

> [I]t has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out. These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution.

Id. at 136. The Court then continued:

> We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.

Id. The Court concluded that lobbying for anticompetitive legislation is protected as long as it is genuinely intended to influence legislation even if it

has the incidental effect of causing direct injury to a competitor or consumer group. *Id.* at. 143-144.

Noerr noted that lobbying campaigns not intended to influence the passage of legislation, however, would not be protected because they would be mere "shams" designed to cause only direct harm to other private actors. *Id.* at 144. There are no allegations in this case that the Defendants' alleged conspiracy to pressure the state into passing the 1987 Act was a mere sham. Without the 1987 Act, the Defendants would have been unable to request and receive the rate increases that Plaintiffs allege caused them injury.

Under *Noerr*, the political activity of the Defendants in seeking to influence the passage of the 1987 Act is clearly protected. In some respects, the Defendants' political activity is less objectionable than that of the railroads in *Noerr* itself. The insurers' conspiracy before the enactment of legislation in 1987 did not even have the incidental effect of causing direct harm to the Plaintiffs.

In its most recent discussion of both *Parker* and *Noerr*, *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991), the Supreme Court indicated that immunity from antitrust liability is lost only in limited circumstances. Omni Outdoor Advertising, a firm seeking to enter the billboard business in Columbia, South Carolina, challenged an alleged anticompetitive conspiracy between the city council and Columbia Outdoor Advertising, an established and politically well connected billboard advertiser. In particular, Omni claimed it had been injured by a zoning ordinance that restricted the size, spacing and location of billboards which "obviously benefitted" Columbia and "severely hindered" Omni's ability to compete. *Id.* at 1348. Omni argued that the City should be stripped of its immunity under *Parker* and Columbia Outdoor Advertising should be stripped of its immunity under *Noerr* because they conspired to restrain competition. The trial court permitted the case

to proceed to trial where a jury found for Omni. Almost three years later, the trial court granted judgment notwithstanding the verdict to the city and Columbia Outdoor Advertising. *Id.* A divided panel of the Fourth Circuit reinstated the jury verdict. *Id.* The Supreme Court reversed, declaring, in effect, that no trial should have been held. *Id.*

The Supreme Court was asked by Omni to create an additional exception to immunity under *Parker* and *Noerr* when state actors and private actors have "conspired" to enact anticompetitive legislation. It declined to do so. According to the Court:

> As we have described, *Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing and the latter the citizens' participation in government.

Id. at 1355. A conspiracy exception to immunity under *Parker* and *Noerr* would require courts to treat most government regulatory action as if it were private rather than state action.

> The impracticality of such a principle is evident if, for purposes of the exception, "conspiracy" means nothing more than an agreement to impose the regulation in question. Since it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them, such an exception would virtually swallow up the *Parker* rule . . . .

Id. at 1351; *see also id.* at 1355 (same reasoning applies re: *Noerr*). The only exceptions to immunity under *Parker* and *Noerr* arise when the government is a commercial participant in a transaction, *id.* at 1351, or when the political activity is a mere sham, *id.* at 1354.

Legislation passed by Maine is subject to public scrutiny. There can be little doubt that any

anticompetitive scheme adopted by the legislature and actively supervised by an administrative agency is the "State's own." *Ticor*, 1992 U.S. LEXIS 3544, at *23. When enacting anticompetitive legislation, "States must accept political responsibility for actions they . . . undertake." *Id.* at *25. If members of the public are disturbed by the consequences of an anticompetitive legislative program they may exercise their right to petition for different legislation and their right to elect different representatives. Anticompetitive state action may be addressed in a variety of ways, unlike a conspiracy wholly among private actors which can only be attacked in court. *See also* 1 Areeda & Turner, *Antitrust Law* ¶¶ 201, 204c.

The first of two Supreme Court cases on which Plaintiffs pin their argument is *Allied Tube and Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). Although the Plaintiffs place a great deal of emphasis on *Allied Tube*'s admonition that courts should be sensitive to the "source, context, and nature of the anticompetitive restraint at issue," *id.* at 499 (paraphrased by Plaintiffs in Transcript at 25-26), Plaintiffs do not acknowledge the very different nature and context of that case. *Allied Tube* involved a challenge brought by a private actor against another private actor for anticompetitive lobbying for a private standard setting organization. *Id.* at 500 ("The relevant context is thus the standard-setting process of a private association.") The Supreme Court held that the defendant's lobbying efforts were not entitled to immunity under *Noerr*, even if those private standards are often adopted by legislative bodies. "Given this context, petitioner does not enjoy the immunity accorded to those who merely urge the government to restrain trade . . . . Whatever de facto authority the Association enjoys, no official authority has been conferred on it by any government . . . ." *Id.* Furthermore, "[u]nlike the publicity campaign in *Noerr*, the activity at issue here did not take place in the open

political arena, where partisanship is the hallmark of decisionmaking, but within the confines of a private standard-setting process." *Id.* at 506. Private lobbying in private contexts has long been subject to antitrust scrutiny; private lobbying before public bodies has not. In short, there is ample reason to distinguish between wholly private conduct, like that held not immune in *Allied Trade*, and efforts to influence legislation in the political arena, like the Defendants' in this case.

Plaintiffs also rely on *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), which created—or confirmed—the commercial participant exception to antitrust immunity. In *Trial Layers*, a group of attorneys who regularly accepted court appointments in the District of Columbia Superior Courts agreed to refuse to accept new cases if the D.C. Council failed to increase their fees by a set date. When that date passed, the lawyers initiated a boycott intended to force the District of Columbia to raise fees. Courts quickly became backlogged, and the D.C. Council raised fees.

Plaintiffs suggest that *Trial Lawyers* drastically limited the scope of *Noerr* immunity, quoting a passage which stated:

> Respondents' agreement is not outside the coverage of the Sherman Act simply because its objective was the enactment of favorable legislation.

Id. at 424. Plaintiffs, again, are insensitive to the particular "nature and context" of the challenged restraint and elide two critical distinctions. First, in *Trial Lawyers* the challenged activity directly injured the government as a commercial participant in the marketplace. The lawyers concerted refusal to accept new appointments prevented the government, as a consumer, from purchasing legal services for indigent criminal defendants. Second, the "restraint of trade . . . would have had precisely the same anticompetitive consequences . . . even if no legislation had been

enacted." *Id.* at 425. The *Trial Lawyers* boycott caused direct injury that antedated the legislation raising fees. The goal of the trial lawyers' conspiracy was to inflict economic pain on the government, forcing it to pass legislation. In this case, however, the Defendants' alleged conspiracy was not intended to harm the government as a commercial participant in the marketplace, only to prompt it to pass anticompetitive legislation. In this case, the Plaintiffs suffered no injury until after the anticompetitive legislation was enacted and the Superintendent of Insurance authorized a rate increase.

The Plaintiffs argue that this interpretation of the cases will "lead to the anomalous result that *unsuccessful* boycotts (*i.e.* boycotts which do not successfully coerce governmental action) would be antitrust violations, but that *successful* boycotts (*i.e.* boycotts to which government succumbs in order to avoid chaos or disaster would be immunized." Plaintiffs' Memo at 35-36 (emphasis in original); *see also* Transcript at 34. Their argument is not persuasive. An unsuccessful conspiracy would not amount to an antitrust violation—or, at least would not give rise to a lawsuit—because the Plaintiffs would have suffered no injury. If the insurers were unable to prompt Maine to permit higher rates, then the Plaintiffs would not have paid higher premiums.

Nor are the Plaintiffs correct in asserting that Maine is, in effect, "retroactively immunizing" the Defendants' illegal activity. Again, although the coordinated political activity of the Defendants led to legislative change, the rate increase which allegedly harmed the Plaintiffs was not approved by the Superintendent of Insurance and levied by Defendants until after the Maine legislature authorized it. Plaintiffs would be justified in charging that retroactive immunity had been granted only if the injury they suffered had been inflicted upon them before the legislature authorized and the Superintendent approved the rate increase.

IV.
Conclusion

The Defendants' conspiracy to press for legislation permitting them to charge higher rates—which in and of itself caused Plaintiffs no injury—is immune under *Noerr*. The Defendants' participation in ratesetting proceedings after legislation was enacted in 1987 which permitted rate increases is immune under *Parker* and *Ticor*. Defendants' motion for summary judgment is, accordingly, *GRANTED*.

SO ORDERED.

/s/
MORTON A. BRODY
United States District Judge

Dated at Bangor, Maine this 18th day of June, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
BANGOR DIVISION

Sandy River Nursing Care Center, Marshwood Nursing Center, On-Time Machining, Inc., Masters Machine, The Baker Company, Gary M. Tirabassi Tile Co., Inc., D.A. Folsom Auction Service Co., Inc., Robert Hackett Construction, Head of the Lake Market, Inc., Parcon, Inc., F.P. and C.H. Murray, Inc., C & P Cassiani Trucking, and Linnco, Inc.

Plaintiffs,

vs.

National Council on Compensation Insurance,

The Aetna Casualty and Surety Company, and its affiliates and subsidiaries, Aetna Casualty & Surety of Illinois, The Standard Fire Insurance Company, The Automobile Insurance Company of Hartford,

American International Group, Inc., and its affiliates and subsidiaries,

American Home Assurance Company, Birmingham Fire Insurance Company of Pennsylvania, Commerce and Industry Insurance Company, The Insurance Company of the State of Pennsylvania, National Union Fire Insurance Company of Pittsburgh, Pennsylvania,

CIGNA Corporation, and its affiliates and subsidiaries, Insurance Company of North America, Indemnity Insurance Company of North America, CIGNA Insurance Company, Pacific Employers Insurance Company, Aetna Insurance Company, Century Indemnity Company, Aetna Fire Underwriters Insurance Company,

CNA Insurance Companies, and its affiliates and subsidiaries, Continental Casualty Company, Transportation Insurance Company, National Fire Insurance Company of Hartford, Transcontinental Insurance Company, American Casualty Company of Reading, Pennsylvania, Valley Forge Insurance Company,

Commercial Union Insurance Companies, and its affiliates and subsidiaries, Commercial Union Insurance Company, The Northern Assurance Company of America, The Employers' Fire Insurance Company, American Employers' Insurance Company,

Continental Insurance Companies,
and its affiliates and subsidiaries,
The Fidelity and Casualty Company of
New York, The Continental Insurance
Company, Commercial Insurance Company
of Newark, New Jersey, Boston Old
Colony Insurance Company, Fireman's
Insurance Company of Newark, New
Jersey, The Glens Falls Insurance
Company, Kansas City Fire and Marine
Insurance, Niagara Fire Insurance
Company,

The Hanover Insurance Companies,
and its affiliates and subsidiaries,
The Hanover Insurance Company,
Citizens Insurance Company of
America, Massachusetts Bay Insurance
Company,

The Hartford, and its affiliates and
subsidiaries, Hartford Fire Insurance
Company, Hartford Accident and Indemnity
Company, Hartford Casualty Insurance
Company, Hartford Underwriters Insurance
Company, Twin City Fire Insurance
Company and Hartford Insurance Company
of the Midwest,

Liberty Mutual Insurance Company,
and its affiliates and subsidiaries,
Liberty Insurance Corporation,

Liberty Mutual Fire Insurance Company,

Maine Bonding and Casualty Company, and its affiliates and subsidiaries, Maryland Casualty Company, Northern Insurance Company of New York, Assurance Company of America, Valiant Insurance Company,

Peerless/Netherlands Group, and its affiliates and subsidiaries, Peerless Insurance Company, The Netherlands Insurance Company,

Royal Insurance Company of America, and its affiliates and subsidiaries, American and Foreign Insurance Company, Globe Indemnity Company, Newark Insurance Company, Safeguard Insurance Company, Royal Indemnity Company,

Sentry Insurance, A Mutual Company, and its affiliates and subsidiaries, Middlesex Insurance Company and Patriot General Insurance Company,

United States Fidelity and Guaranty Company, and its affiliates and subsidiaries,

The Travelers Insurance Companies, and its affiliates and subsidiaries, Bankers & Shippers Insurance Company of New York, The Charter Oak Fire Insurance Company, The Travelers Indemnity Company of America, The Travelers Indemnity Company of Illinois, The Travelers Indemnity Company of Rhode Island, The Phoenix Insurance Company, The Travelers Indemnity Company,

Defendants.

PLAINTIFFS' FIRST AMENDED COMPLAINT FOR TREBLE DAMAGES AND INJUNCTIVE RELIEF UNDER THE FEDERAL AND STATE ANTITRUST LAWS - AND DEMAND FOR JURY TRIAL

Plaintiffs, on behalf of themselves and the class defined hereinbelow, demanding a trial by jury, state and allege as follows:

I.

JURISDICTION AND VENUE

1. Plaintiffs' claims arise and are brought under Title 15, U.S.C. Section 1, Title 15 U.S.C. Sections 4, 15 and 26, and other provisions of the Sherman Antitrust Act and Clayton Antitrust Act, and under the Maine Antitrust Act, 10 MRSA §§1101 et seq., to enjoin defendants from violating said Acts and laws, and for

treble damages, and the costs of suit, including reasonable attorney's fees, for said violations.

2. Jurisdiction is conferred upon this Court by virtue of Title 28 U.S.C. Sections 1331, 1332 and 1337. The Court has pendent jurisdiction of the state law claims asserted herein.

3. Each defendant transacts business or is found or has an agent within this District and the unlawful activities complained of were and are being carried on in part by defendants within this District. Each insurer defendant is or was during the period from August 1, 1987 to the present date (hereinafter "the relevant period") licensed to issue workers' compensation insurance policies in the State of Maine and by virtue of the laws of the State of Maine has appointed the Superintendent of Insurance of the State of Maine as service agent. The Insurance Superintendent's office is in this District. Defendant National Council on Compensation Insurance ("NCCI") is the licensed rating organization for workers' compensation insurance in the State of Maine.

4. Venue is laid in this District pursuant to Section 12 of the Clayton Act, 15 U.S.C. Sec. 22 and 28 U.S.C. Sec. 1391(b) and (c).

5. Plaintiffs demand a trial by jury.

II.
PLAINTIFFS

6. Plaintiff Sandy River Nursing Care Center is a Maine corporation duly existing and operating under the laws of the State of Maine with its principal place of business in Farmington. Plaintiff Sandy River Nursing Care Center is an employer in the State of Maine required to provide workers' compensation insurance under 39 MRSA §1 et seq.

7. Plaintiff Marshwood Nursing Center is a Maine corporation duly existing and operating under the laws of the State of Maine with its principal place of business in Lewiston. Plaintiff Marshwood Nursing Center is an employer in the State of Maine required to provide workers' compensation insurance under 39 MRSA §1 et seq.

8. Plaintiff On-Time Machining, Inc. is a Maine corporation duly existing and operating under the laws of the State of Maine with its principal place of business in Waterboro. Plaintiff On-Time Machining, Inc. is an employer in the State of Maine required to provide workers' compensation insurance under 39 MRSA §1 et seq.

9. Plaintiff Masters Machine is a Maine corporation duly existing and operating under the laws of the State of Maine, with its principal place of business in Round Pond. Plaintiff Masters Machine is an employer in the State of Maine required to provide workers'

compensation insurance under 39 MRSA §1 et seq.

10. Plaintiff The Baker Company is a Maine corporation duly existing and operating under the laws of the State of Maine, with its principal place of business in Sanford. Plaintiff The Baker Company is an employer in the State of Maine required to provide workers' compensation insurance under 39 MRSA §1 et seq.

11. Plaintiff Gary M. Tirabassi Tile Co., Inc. is a Maine corporation duly existing and operating under the laws of the State of Maine with its principal place of business in Cumberland. Plaintiff Gary M. Tirabassi Tile Co., Inc. is an employer in the State of Maine required to provide workers' compensation insurance under 39 MRSA §1 et seq.

12. Plaintiff D.A. Folsom Auction Service Co., Inc. is a Maine corporation duly existing and operating under the laws of the State of Maine with its principal place of business in Aroostook. Plaintiff D.A. Folsom Auction Service Co., Inc. is an employer in the State of Maine required to provide workers' compensation insurance under 39 MRSA §1 et seq.

13. Plaintiff Robert Hackett Construction is a Maine corporation duly existing and operating under the laws of the State of Maine with its principal place of business in Topsham. Plaintiff Robert Hackett Construction is an employer in the State of Maine required to provide workers' compensation insurance under 39 MRSA §1 et seq.

14. Plaintiff Head of the Lake Market, Inc. is a Maine corporation duly existing and operating under the laws of the State of Maine with its principal place of business in Kennebec. Plaintiff Head of the Lake Market, Inc. is an employer in the State of Maine required to provide workers' compensation insurance under 39 MRSA §1 et seq.

15. Plaintiff Parcon, Inc. is a Maine corporation duly existing and operating under the laws of the State of Maine with its principal place of business in Newport. Plaintiff Parcon, Inc. is an employer in the State of Maine required to provide workers' compensation insurance under 39 MRSA §1 et seq.

16. Plaintiff F.P. and C.H. Murray, Inc. is a Maine corporation duly existing and operating under the laws of the State of Maine with its principal place of business in South Portland. Plaintiff F.P. and C.H. Murray, Inc. is an employer in the State of Maine required to provide workers' compensation insurance under 39 MRSA §1 et seq.

17. Plaintiff C & P Cassiani Trucking is a Maine corporation duly existing and operating under the laws of the State of Maine with its principal place of business in Waterville. Plaintiff C & P Cassiani Trucking is an employer in the State of Maine required to provide workers' compensation insurance under 39 MRSA §1 et seq.

18. Plaintiff Linnco, Inc. is a Maine corporation duly existing and operating under the laws of the State of Maine with its principal place of business in Brunswick. Plaintiff Linnco, Inc. is an employer in the State of Maine required to provide workers' compensation insurance under 39 MRSA §1 et seq.

19. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the class of plaintiffs defined at paragraph 24.a. of this Complaint.

20. Plaintiffs and members of the class purchased workers' compensation insurance from one or more of the above-named defendants, or from one or more co-conspirators of the above-named defendants, or from one or more other insurance companies who utilized the higher rates for workers' compensation insurance which resulted from the conspiracy alleged hereinbelow.

III.
DEFENDANTS

21. Defendant National Council on Compensation Insurance, (hereinafter "NCCI") is a voluntary, unincorporated association and is a rating organization under 24-A MRSA §2309 et seq.

22. Each of the insurance companies named in the caption of this Complaint is made a defendant herein. Each of said defendants is incorporated and exists under the laws of Maine or of another state, and each is or was

licensed to sell workers' compensation insurance in the State of Maine. During all or part of the period covered by this Complaint, each of said companies sold workers' compensation insurance coverage to one or more members of the Plaintiff class in the State of Maine.

IV.
CO-CONSPIRATORS

23. Upon information and belief, various individuals, partnerships, corporations, and associations, including other workers' compensation insurers, have participated as co-conspirators in the violations alleged herein and have performed acts and made statements in furtherance thereof. At such time as Plaintiffs ascertain the identity of any such co-conspirator, Plaintiffs may seek to amend this Complaint to name such co-conspirators as additional defendants herein.

24. Plaintiffs bring this action on behalf of themselves and as a class action under the provisions of Rule 23, Fed.R.Civ.P. on behalf of all members of a class defined as follows:

a. The Class consists of all employers (excluding defendants and co-conspirators, including any subsidiary or affiliate thereof and excluding those employers who were self-insured) doing business within the State of Maine required by Maine law to carry workers' compensation insurance coverage who between November 20, 1987 and the present date (hereinafter "the damage period") purchased policies of workers'

compensation insurance from one or more of the named defendants, including any subsidiary or affiliate thereof, or from one or more of defendants' co-conspirators, or from any insurance company utilizing the higher rates for workers' compensation insurance which resulted from defendants' unlawful conspiracy.

b. Plaintiffs believe, after examination of records available, that there are thousands of class members who purchased workers' compensation insurance as above set forth; their exact number and identities are known to defendants herein, and are ascertainable by examination of defendants' records. The number of class members is not so large as to make this class action unmanageable.

c. The class is so numerous that joinder of all members is impracticable.

d. There are numerous questions of fact and law common to the class, which questions relate to the existence of the facts, acts and conspiracy hereinafter alleged and include inter alia the following:

(1) whether the defendants and their co-conspirators have combined, conspired or agreed to fix, raise, maintain, or stabilize the prices charged to plaintiffs and the class for workers' compensation insurance coverage;

(2) whether defendants and their

co-conspirators have agreed and acted to boycott, coerce and intimidate the State of Maine and the class into permitting the use of higher rates, thereby effectuating their agreement to fix prices;

(3) whether the defendants and their co-conspirators have combined, conspired, or agreed to restrain and suppress competition among themselves and others in the sale of workers' compensation insurance coverage;

(4) whether the defendants and their co-conspirators have combined, conspired, or agreed to deprive purchasers of workers' compensation insurance coverage of the benefit of free and open competition;

(5) whether the defendants have agreed and acted to enforce their agreement to fix prices by utilizing agreements to, and acts of, boycott, coercion and intimidation directed against other workers' compensation insurers;

(6) whether the unlawful activities of defendants and their co-conspirators have resulted in the plaintiffs and class members paying premiums for workers' compensation insurance calculated using

rates higher than the previously approved maximum rates permitted by law;

(7) whether an injunction should issue to enjoin defendants and their co-conspirators form engaging in the activities complained of herein.

e. Each plaintiff is a member of said class and each plaintiff's claims are typical of the claims of class members and each plaintiff will fairly and adequately protect the interests of the class. The interests of each plaintiff are coincident with, and not antagonistic to, those of the remainder of the class.

f. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications establishing incompatible standards of conduct for defendants.

g. Defendants and their co-conspirators have acted, and refused to act, on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

h. The questions of law and fact common to the class predominate over any questions affecting only individual members.

i. The class action is superior to other available methods if any for the fair and efficient adjudication of this controversy. The class is readily

definable and is one for which sales records exist. Prosecution as a class action will eliminate the possibility of repetitious litigation, while also providing redress for claims too small to support the expense of individual, complex litigation.

V.
TRADE AND COMMERCE

25. As used herein, "workers' compensation insurance" or "insurance" means workers' compensation insurance and insurance covering any part of the workers' compensation liability of an employer not exempted from insuring its liability for workers' compensation, as provided in Maine law.

26. As used herein, the term "insurer" and "workers' compensation insurer" means any insurance carrier authorized by license issued by the Maine Superintendent of Insurance to transact the business of workers' compensation insurance in the State of Maine.

27. As used herein, the term "NCCI" means the defendant National Council on Compensation Insurance.

28. During the period of time covered by this Complaint:

(a) defendants and their co-conspirators sold substantial quantities of workers' compensation insurance in interstate commerce, amounting to several hundreds of millions of dollars in

premiums;

(b) substantial amounts of money, in the form of premium payments, were transferred in a continuous and uninterrupted flow of interstate commerce.

The restraints hereinafter alleged have directly and substantially affected interstate commerce.

VI.
RELEVANT MARKET

29. The State of Maine is the relevant geographic market.

30. The market for workers' compensation insurance, excluding self-insurance, is the relevant product or service market.

VII.
FEDERAL ANTITRUST OFFENSES CHARGED

31. Plaintiffs reallege the allegations contained in paragraphs 1 through 30 above.

32. Each insurer defendant was, during at least part of the relevant period a licensed workers' compensation insurer in the State of Maine. Each insurer defendant was and is required by Maine law to charge only those rates for workers' compensation insurance which have been filed with, and approved by, the Maine

Superintendent of Insurance in conformance with Maine law. Defendant NCCI is a workers' compensation insurance rating organization which filed with the Maine Superintendent of Insurance rates on behalf of its members. Each insurer defendant was and is a member of NCCI. Defendants Insurance Company of North America, Liberty Mutual Insurance Company, The Travelers Insurance Company, The Hartford, United States Fidelity and Guaranty Company, and Royal Insurance Company of America are or were members of NCCI's Board of Directors. Defendants Maryland Casualty Company, Aetna Casualty and Surety Company, Commercial Union Insurance Company, The Hanover Insurance Company and The Travelers Insurance Company are or were members of NCCI's Classification and Rating Committee for Maine.

33. Prior to 1987 Maine law contained limitations of various kinds on the rates which could be charged by workers' compensation insurers to Maine policyholders. In 1985 the Maine legislature enacted statutes reducing by at least 8% the rates which workers' compensation insurers could charge. The 1985 legislation further provided that rates would be frozen until 1987, and that in 1987, 1988 and 1989 rate increases could not exceed 10% per year. In 1987 a Maine court rejected a constitutional challenge to the 1985 statute brought by certain workers' compensation insurers and the NCCI.

34. The NCCI and its members were dissatisfied with the rate level permitted by the 1985 legislation and in the fall of 1987 the defendants herein and their co-

conspirators entered into a conspiracy designed to coerce the State of Maine to repeal the 1985 legislation and to permit rate increases in excess of those permitted by the 1985 legislation. The conspiracy included an agreement to withdraw from the Maine market, and to intimidate and coerce other insurance companies to similarly withdraw from the market. In conformance with this conspiracy during the fall of 1987 each insurer defendant and certain insurer co-conspirators informed the Maine Superintendent of Insurance that they would withdraw from the market for workers' compensation insurance in Maine.

35. This action by virtually the entire workers' compensation insurance industry in Maine precipitated a crisis wherein employers in the State of Maine were threatened with the inability to purchase workers' compensation insurance which, by Maine statute, each employer was and is obligated to carry. In response to this crisis, the Governor called a Special Session of the Maine Legislature during the fall of 1987. The exclusive purpose of this Special Session was to address the workers' compensation crisis in Maine. At that time all of the top twenty companies in the State of Maine had withdrawn or threatened to withdraw, or filed with the Superintendent of Insurance notice of its intention to withdraw, from the market, with only nine or ten insurers remaining out of the one hundred ten (110) which had been writing workers' compensation insurance in Maine.

36. As a direct result of the crisis created by defendants' conspiracy the Legislature enacted, and the

Governor signed, P.L. 1987 c.559, (the "1987 legislation") which removed the limitations on rate increases contained in the 1985 legislation. Rate increases totalling in excess of 25% were implemented in 1988, with an additional increase of 22% in 1989, and 4% in 1990. In addition, under a concept labelled "Fresh Start" pursuant to 24-A M.R.S.A. §2367 enacted as part of the 1987 legislation, insurers were permitted to recoup alleged losses incurred in prior years by charging higher prices for current workers' compensation insurance policies. The total amount of such "Fresh Start" additional premiums exceeded $150,000,000.

37. The State of Maine has a policy permitting price competition in workers' compensation insurance and has not regulated the business of insurance to the extent of permitting insurers to boycott, coerce or intimidate purchasers of workers' compensation insurance and the State of Maine for the purpose of obtaining higher prices for workers' compensation insurance.

COUNT I
PRICE FIXING

38. Plaintiffs reallege the allegations contained in paragraphs 1 through 37 above.

39. Beginning not later than September, 1987 the exact date being unknown to plaintiffs, and continuing thereafter, upon information and belief, to the present date, the defendants and their co-conspirators engaged in a continuing combination and conspiracy in unreasonable

restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (Title 15 U.S.C. Section 1), commonly known as the Sherman Act.

40. The aforesaid combination and conspiracy consisted of a continuing combination, agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were to fix, raise, maintain and stabilize the prices of workers' compensation insurance in the State of Maine.

41. For the purpose of forming and effectuating the aforesaid combination and conspiracy the defendants and their co-conspirators have done those things which they combined and conspired to do including, among other things, the following:

(a) Defendants have held meetings, exchanged correspondence, and had other communications at which times the defendants and co-conspirators:

(i) agreed to fix, raise, maintain and stabilize the prices of workers' compensation insurance in Maine;

(ii) agreed to publish, through defendant NCCI announcements with respect to price-related terms of workers' compensation insurance coverage;

(iii) had opportunities to and, upon information and belief, did exchange inter se information with respect to prices and price-related terms for workers' compensation insurance to be charged to defendants' customers, other than through defendant NCCI.

(b) As members of, and through, defendant NCCI defendants agreed to utilize uniform rates which were higher than those which would have prevailed in the absence of defendants' conspiracy, as a result of defendants' acts and agreement to boycott, coerce and intimidate as alleged herein.

42. The above-described conduct is not part of the "business of insurance" under Title 15 U.S.C. Sec. 1012(b) because it is unrelated to spreading or transferring risk and is not an integral part of the policy relationship between the insurers and the plaintiffs and class members.

43. The above-described conduct is not regulated by the State of Maine, and occurred outside of any applicable state regulation.

44. The above-described conduct constitutes a continuing combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as

amended (Title 15, U.S.C. Section 1), commonly known as the Sherman Act.

II.
ENFORCEMENT AND EFFECTUATION OF PRICE-FIXING AGREEMENT THROUGH ACTS AND AGREEMENT TO BOYCOTT, COERCE AND INTIMIDATE PURCHASERS OF WORKERS' COMPENSATION INSURANCE

45. Plaintiffs reallege the allegations contained in paragraphs 1 through 44 above.

46. The defendants and their co-conspirators agreed to enforce and effectuate, and did enforce and effectuate, their agreement to fix prices:

(a) by agreeing to boycott, coerce and intimidate purchasers of workers' compensation insurance by agreeing and threatening to refuse to sell workers' compensation insurance to purchasers in the State of Maine until and unless the State of Maine repealed the limitations on rates and permitted larger rate increases;

(b) by acting in concert to boycott, coerce and intimidate purchasers of workers' compensation insurance by refusing to sell workers' compensation insurance to purchasers in the State of

Maine until and unless the State of Maine repealed the limitations on rates and permitted larger rate increases; and

(c) by agreeing to refuse in concert, and by refusing in concert, to sell workers' compensation insurance to members of the Plaintiff class at the lawful rates in effect prior to November, 1987.

47. The above-described conduct constitutes a continuing combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (Title 15, U.S.C. Section 1), commonly known as the Sherman Act.

COUNT III.
ENFORCEMENT AND EFFECTUATION OF PRICE-FIXING AGREEMENT THROUGH ACTS AND AGREEMENT TO BOYCOTT, COERCE AND INTIMIDATE WORKERS' COMPENSATION INSURERS

48. Plaintiffs reallege the allegations contained in paragraphs 1 through 47 above.

49. The defendants and their co-conspirators agreed to enforce and effectuate, and did enforce and effectuate, their agreement to fix prices:

(a) by agreeing to boycott, coerce and intimidate workers' compensation insurers with the purpose and effect of maintaining adherence by workers' compensation insurers to the terms of the price-fixing and boycott agreements;

(b) by engaging in concerted acts of boycott, coercion and intimidation directed against workers' compensation insurers with the purpose and effect of maintaining adherence to the terms of the price-fixing and boycott agreements; and

(c) by agreeing and acting in concert to police adherence to the terms of the price-fixing and boycott agreements.

50. The above-described conduct constitutes a continuing combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (Title 15, U.S.C. Section 1), commonly known as the Sherman Act.

IX.
STATE ANTITRUST OFFENSES CHARGED

COUNT IV
PRICE-FIXING, BOYCOTT, AND MONOPOLIZATION

51. Plaintiffs reallege the allegations contained in paragraphs 1 through 50 above.

52. Beginning not later than September, 1987 the exact date being unknown to plaintiffs, and continuing thereafter, upon information and belief, to the present date, the defendants and their co-conspirators engaged in a continuing combination and conspiracy in unreasonable restraint of the aforesaid trade and commerce in violation of 10 MRSA §1101 et seq.

53. The aforesaid combination and conspiracy consisted of a continuing combination, agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were to fix, raise, maintain and stabilize the prices of workers' compensation insurance in the State of Maine, to boycott, coerce and intimidate workers' compensation insurers and insureds, and to monopolize the business of workers' compensation insurance in the State of Maine.

X.
EFFECTS OF ANTITRUST OFFENSES

54. The aforesaid combination, conspiracy and conduct has had the following effects, among others:

(a) prices for workers' compensation insurance coverage have been raised, fixed, maintained and stabilized at excessive, artificial and non-competitive levels;

(b) purchasers of workers' compensation insurance coverage, including plaintiffs and members of the plaintiff class, have been deprived of free and open competition in the purchase of workers' compensation insurance;

(c) competition in the business of workers' compensation insurance among the defendants and their co-conspirators has been restrained;

(d) the market for workers' compensation insurance has been monopolized by defendants and their co-conspirators.

XI.
INJURY AND DAMAGE TO PLAINTIFFS AND THE CLASS RESULTING FROM ANTITRUST VIOLATIONS

55. During the period covered by this Complaint, each plaintiff and each member of the plaintiff class has purchased workers' compensation insurance coverage from defendants, or from subsidiaries or affiliates thereof, or from one or more of defendants' co-conspirators, or from an insurance company utilizing the higher rates for workers' compensation insurance which resulted from defendants' unlawful conspiracy. By reason of the violations of the antitrust laws alleged hereinabove, each plaintiff and each member of the plaintiff class paid more for workers' compensation insurance coverage than they would have paid in the absence of the unlawful combination, conspiracy, and conduct of defendants and their co-conspirators and, as a result, they have been injured in their business and property in amounts not yet determined. A determination of the exact amount of damages suffered by each plaintiff and each member of the plaintiff class will require further discovery.

XII.
RELIEF REQUESTED

WHEREFORE, plaintiffs, for themselves and for and on behalf of the plaintiff class, pray for judgment against the defendants, as follows:

1. That the Court promptly determine that this

action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure.

2. That the aforesaid combination, conspiracy and conduct of defendants be adjudged to have been in violation of Section 1 of the Sherman Act, 15 U.S.C. Sec. 1 and of the Maine Antitrust Act, 10 MRSA §§1101 et seq.

3. That judgment be entered for plaintiffs and the members of the class against defendants for threefold the amount of damages sustained by plaintiffs and the members of the class, together with the costs of this action, including reasonable attorney's fees.

4. That defendants, their subsidiaries, affiliates, successors, transferees, and assignees and the respective officers, directors, partners, agents and employees thereof, and all other persons acting or claiming to act on their behalf, be permanently enjoined from, in any manner:

(a) Continuing, maintaining or renewing the combination, conspiracy and conduct alleged hereinabove; and

(b) Entering into any similar combination, conspiracy or conduct which has the purpose or effect of restraining trade or substantially lessening competition in the business of workers' compensation insurance.

5. That plaintiffs and members of the plaintiff class have such other, further and different relief as the case may require and as the Court may deem just and proper under the circumstances.

Dated: November 27, 1991

Respectfully submitted,

CURTIS, THAXTER, STEVENS,
BRODER & MICOLEAU

By: _____
Sidney St.F. Thaxter
John D. Gleason
Stephen E. Champagne
One Canal Plaza
Portland, ME 04112
(207) 775-2361

SIEGEL, BRILL, GRUEPNER & DUFFY, P.A.

By: _____
K. Craig Wildfang
Wood R. Foster, Jr.
1350 Washington Square
100 Washington Avenue South
Minneapolis, MN 55401
(612)339-7131

OPPERMAN HEINS & PAQUIN

By:_____
Vance K. Opperman
Robert J. Schmit
2200 Washington Square
100 Washington Avenue South
Minneapolis, MN 55401
(612) 339-6900

Sherman Act §1 (15 U.S.C. §1)

§1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Nov. 16, 1990, P.L. 101-588 §4(a), 104 Stat. 2880.)

Clayton Act §4 (15 U.S.C. §15)

§15. Suits by persons injured

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or if found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee . . . .

1985 Maine Statutes (repealed)
Maine Revised Statutes Annotated
tit. 24-A §§2331, 2332, 2347, 2355
(pertinent text only)

Subchapter II.
Workers' Compensation Competitive Rating Act

2331. "Workers' Compensation Competitive Rating Act"

This subchapter shall be known and may be cited as the "Workers' Compensation Competitive Rating Act." (1985, c. 372, §B.5.)

2332. Purposes

The purposes of this Act are:

1. Prohibit price fixing. To prohibit price fixing agreements and other anticompetitive behavior by insurers;

2. Protect policyholders and the public. To protect policyholders and the public against the adverse effects of excessive, inadequate or unfairly discriminatory rates;

3. Promote price competition. To promote price competition among insurers so as to provide rates that are responsive to competitive market conditions;

4. Provide regulatory procedures. To provide regulatory procedures for the maintenance of appropriate data reporting systems; . . .

2347. Rate agreements; prohibited advisory practices

1. Restraint of trade. No insurer or advisory organization may make any arrangement with any other insurer, advisory organization or other person which has the purpose or effect of unreasonably restraining trade or substantially lessening competition in the business of insurance.

2. Rate agreements. No insurer may agree with any other insurer or with an advisory organization to adhere to or use a rate or rating plan other than a uniform experience or classification rating plan or rating rule except as needed to comply with the requirements of section 2341.

3. Proof of agreement. The fact that 2 or more insurers, whether or not members or subscribers of an advisory organization, use the same rule, rating plan, rating schedule, rating rule, policy form, rate classification, underwriting rule, survey or inspection or similar material is not sufficient in itself to support a finding that an agreement exists. . . .

2355. Rate changes

The following provisions shall apply to all workers' compensation insurance rates under this subchapter and Title 39, sections 22-C and 22-D.

1. Purpose. The provisions of this section reflect the rate effect of amendments to Title 39 implemented by Public Law 1983, chapter 479 and by this

Act and the consideration of investment income attributable to insurance premiums and reserves which income has not previously been considered in establishing present rates.

2. Rate reduction. A rate filing shall not be effective after the effective date of this section unless the overall manual rate level is reduced at least 8% from the overall manual rate level in effect on January 1, 1985. If no rate filing is effective after the effective date of this section, the superintendent shall immediately promulgate rates to be effective on August 1985, whose overall manual rate level is reduced at least 8% from the overall manual rate level effective on January 1, 1985. The superintendent's determination without a filing shall require notice and hearing as provided under Title 5, chapter 375, subchapter IV; and the notice and hearing provisions of this Title and Title 39, sections 22-C and 22-D shall not apply.

A. "Overall manual rate level" means the projected total amount of money to be generated by the applications of manual rates per $100 of payroll on file with the superintendent exclusive of any rating system adjustments including minimum premiums, loss constants, experience or retrospective rating plans or dividend plans.

B. An insurer may not use a rate for workers' compensation insurance higher than this rate.

3. Rates during 1985 and 1986. From July 1, 1985, to December 31, 1986, each insurer's rates shall not exceed the workers' compensation rates in effect on June 30, 1985, except that this rate shall be adjusted under subsection 2.

4. Rates during 1987. From January 1, 1987, to December 31, 1987, each insurer's rates shall not exceed the workers' compensation rates in effect on December 31, 1986, increased by no more than 10%.

5. Rates during 1988. From January 1, 1988, to December 31, 1988, each insurer's rates shall not exceed the workers' compensation rates allowed under subsection 4, increased by no more than 10%.

6. Application. The rate limitations in this section shall apply to workers' compensation insurance written in this State and to rates in the competitive and residual markets. For policies in effect on the effective date of this section, the premiums due or paid shall be reduced on a pro rata basis for the remainder of the term of that policy after August 1, 1985, to reflect the reduction under subsection 2.

1987 Emergency Legislation
1987 Maine Laws, First Spec. Sess.
CHAPTER 559
(pertinent text only)
S.P. 704 - L.D. 1929

AN ACT to Improve the Maine Workers' Compensation System.

Emergency preamble. Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, there is a statutory requirement that all employers in the State provide workers' compensation coverage; and

Whereas, most, if not all, of the insurance carriers writing such workers' compensation insurance in the State are withdrawing from the business; and

Whereas, comprehensive legislative reform is urgently needed as it is the only possibility for saving the private insurance market for workers' compensation, without which employers cannot operate; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

2. Determination of rates. Every insurer issuing workers' compensation insurance policies shall file with the superintendent its classification of risks and maximum premium rates, which may not take effect until the superintendent has approved them. The superintendent shall apply the procedures and standards of this section in investigating, reviewing and determining just and reasonable rates. The superintendent may:

A. Require the filing of specific rates for workers' compensation insurance, including classification of risks, experience or any other rating information from insurance companies authorized to transact insurance in this State;

B. Make or cause to be made investigations as he deems necessary to satisfy himself that the rates to be promulgated are just and reasonable; and

C. At any time, after public hearing, withdraw his approval of a previously approved rate filing.

3. Notice of filing. At least 20 days prior to any filing for rates under this section, a person filing shall notify the superintendent in writing of the intention to file and shall disclose the approximate amount of a requested increase or decrease and a description of major rating rule changes to be proposed. Within 10 days of receipt, the superintendent shall notify the public by publication in a newspaper of general circulation and notify the Public Advocate that a rate filing is to be made. Restrictions on ex parte communications, as provided for in Title 5, section 9055, shall be applicable on the date the superintendent receives the notice of intention to file.

* * *

Sec. 3. 24-A MRSA c. 25, sub-c.II, as amended, is repealed.

Sec. 4. 24-A MRSA c.25, sub-c.II-A is enacted to read:

SUBCHAPTER II-A

§2361. Title

This subchapter shall be known and may be cited as the "Workers' Compensation Competitive Rating Act."

§2362. Workers' compensation rates

Workers' compensation rates and classifications shall be approved, modified, or disapproved by the superintendent subject to this chapter. Rates determined by the superintendent are maximum rates. Premium rates less than those approved may be used if filed with the superintendent within 5 days after commencing use. If the superintendent has reason to believe that the filing produces rates which are inadequate or unfairly discriminatory, he may disapprove them under chapter 23 and chapter 25, subchapter I.

§2363. Approval of insurance policies and rates.

The following provisions apply to workers' compensation insurance policies and rates.

* * *

4. Contents of filing. A rate filing shall include:

A. For each of the 3 calendar years immediately preceding the date of the filing including, in the case of a filing made by a rating organization, data for each year from each insurer which had 1% or more of the total written premiums for that year:

(1) The actual direct earned premiums allocable to the coverage of risks in this State;

(2) Unearned premiums, earned premiums, loss and loss expense reserve and capital and surplus subject to investment, allocable to the coverage of risks in this State;

(3) For the investment corresponding to the liabilities and capital and surplus referred to in subparagraph (2):

(a) The amount of investments;

(b) The types of investments; and

(c) The annual income amounts, before taxes, generated by the aggregate of these investments;

(4) The gross rate of return on admitted assets;

(5) The amount of dividends or the equivalent allowed or returned to policyholders;

(6) The aggregate annual expenses allocable to the coverage of risks in this State, including

acquisition and field supervision expenses, taxes, licenses and fees, other than federal income tax and general expenses, each stated separately. Safety engineering expense and loss control services' expense shall be stated separately under general expense;

(7) The aggregate annual losses and loss adjustment expenses allocable to the coverage of risks in this State; and

(8) The changes and improvements instituted in loss control and employee safety engineering;

With respect to rate filings made before July 1, 1988, the information required by subparagraphs (1) to (8) shall be required only for each of the 3 calendar years immediately preceding the date of the filing for which financial information is available;

B. For each risk classification:

(1) The rate presently applicable to the classification;

(2) The rate proposed for the classification;

(3) Loss experience in this State for each of the 3 most recent years available, including, in each classification, payroll, number of serious workers' compensation cases, number of nonserious cases, the losses, including medical expense incurred with respect to each type of case, loss adjustment expense and the total of all losses and expenses incurred; and

(4) The information required by this paragraph shall be presented in tabular form;

C. If data reported is determined by percentage factors, rather than actual expense, an explanation of the basis of the factors used;

D. Statements or exhibits that reasonably substantiate assumptions, methodology or calculations used in support of the proposed rates or to generate the information or data in the filing and identification of any of those that are known or believed to be contrary to established policy of the superintendent; and

E. Any other information required to be included by the superintendent.

5. Aggregate data. Aggregate expense data, annual losses, loss adjustment, expense data and loss experience data required to be reported under subsection 4, paragraph A; subparagraphs (6) and (7), and paragraph B, subparagraph (3), shall be based on expense and experience data pertaining to this State, except as otherwise provided in this subsection. The rate of return on capital and surplus used in establishing the rates requested, the rate of return on the investment allocable to the coverage of risks in this State and the facts, assumptions and calculations employed to derive each rate of return shall also be reported in the aggregate.

A. To the extent that the State expense and experience data is not fully credible, the superintendent may allow reporting of and consider data from outside this State.

B. Aggregate loss experience data shall:

(1) Include and be categorized as required in subsection 4, paragraph B, subparagraph (3); and

(2) Be presented in tabular form. The table shall indicate, with respect to each classification, the relative weight given to experience in this State and to national experience in determining the applicable rate.

6. Additional information. The superintendent may require, at any time, any additional information he deems necessary and may reasonably extend the time periods established in subsection 9 to allow time to provide that information.

A. Within 30 days of receipt of a filing, the superintendent shall determine if the filing is complete.

(1) If the filing is incomplete, the superintendent shall notify the applicant and all parties in writing of those deficiencies.

(2) An applicant shall complete or amend the filing within 30 days of that written notice. Upon motion by the applicant made within the 30-day period and upon a showing of good cause, the superintendent may extend the 30-day period as he deems appropriate.

(3) An action or inaction by the superintendent under this paragraph does not constitute a substantive finding that the information in the filing is sufficient to establish that any action or relief should be granted or that any facts have been proven or limit the superintendent's authority to request further information or data.

B. If the applicant fails to furnish the information within the time prescribed, the superintendent may issue an order dismissing the filing.

C. For all purposes, the date of completing the filing shall be deemed the date on which the last document that made the filing complete was received by the superintendent, except that the superintendent may treat the day that the incomplete filing was filed as the filing date if the incompleteness is found to be immaterial or not to have delayed, impeded or interfered with the ability of the superintendent, bureau or any party to respond to, investigate or process the filing.

7. Standard of approval. This subsection applies to determination of just and reasonable rates for a filing.

A. The superintendent shall establish rates, based on the filing and sworn testimony, which are, in addition to any other requirements:

(1) Just and reasonable and not excessive, inadequate or unfairly discriminatory; and

(2) Based only on a just and reasonable profit,

B. In establishing just and reasonable rates, the superintendent shall consider:

(1) The reasonableness of any return on capital and surplus allocable to the coverage of risks in this State;

(2) The reasonableness of the amounts of capital and surplus allocable to the coverage or risks in this State;

(3) The reported investment income earned or realized from funds generated from business in this State;

(4) The reported loss reserves, including the methods and the interest rates used in determining the present value for reported reserves and the use of those reserves in the determination of the proposed rates;

(5) The reported annual losses and loss adjustment expenses;

(6) The measures taken to contain costs, including loss control, loss adjustment and employee safety engineering programs;

(7) The relationship of the aggregate amount of operating expenses reported by all companies to the annual operating expenses reported in the filing and the annual insurance expense exhibits filed by each company with the superintendent;

(8) The impact of operating and management

efficiency of the companies on expense levels and the effect of variations in expense levels on rates; and

(9) Any premium surcharges or credits ordered by the superintendent pursuant to section 2367.

C. The justness and reasonableness of rates shall be determined for the period in which the rates are in effect. Losses in the residual market in any preceding year may not be included in the determination of rates.

D. The filer shall have the burden of proving that the rates meet the requirements of this chapter and chapter 23.

E. The superintendent may not approve an increase or decrease in rates unless he finds that the information supplied in the filing and sworn testimony is accurate and sufficient to meet the requirements of this section.

F. For the introduction of a new rate for a new classification or the adjustment of a single rate for an existing classification, the requirements of paragraph A, subparagraph (1); subsection 2; subsection 4, paragraphs B to E; and subsections 8, 10, 13 and 14 shall apply. The superintendent shall establish the new rate at a level which is not unfairly discriminatory in relation to the currently approved rates for other classifications.

8. Public record. A rate filing shall be a public record and shall be available for public review and inspection.

9. Public Advocate participation. The Public

Advocate shall participate as follows.

A. The Public Advocate, as appointed under Title 35-A, section 1701, shall be a party to the proceeding resulting from each rate filing made under this section. A copy of the filing shall be served on the Public Advocate at the same time as it is filed with the superintendent.

B. A party filing for a rate change under this section shall pay to the superintendent at the time of filing a filing fee of $50,000, which the superintendent shall immediately credit to the Public Advocate. The fee shall be segregated and expended for the purpose of employing outside consultants and of paying other expenses to fulfill the requirements of this subsection. Any portion of the fee not so expended shall be returned to the filer.

10. Information for parties and intervenors. A party or intervenor may make written application to the superintendent for an order that filer produce information relevant to whether the filing meets the requirements of this Title, except for information relating to a particular claim or information which is unduly burdensome or repetitious. If the party filing fails to furnish the information within the time prescribed by the superintendent, the party or intervenor making the request may make written application to the superintendent for an order dismissing the filing. If, after a hearing, the superintendent determines that the failure to furnish the information was without good cause, he shall issue an order for dismissal of the filing.

11. Public hearing. The superintendent shall hold a public hearing as provided in sections 229 and 235 on each filing. The public hearing shall be conducted no sooner than 30 days and no later than 60 days of the date the rate filing is deemed complete by the superintendent, unless the superintendent extends these limits under subsection 6. The superintendent shall establish just and reasonable rates and state his findings in a written order issued within 90 days from the date the filing is completed, unless he extends this limit under subsection 6. If the superintendent denies or dismisses a filing, any further filing shall be deemed to be a new filing, subject to this public hearing requirement.

12. Subsequent filing. A person may not file a rate filing within 180 days of receiving a rate increase or decrease. If a filing has been disapproved by the superintendent, the requirements of this subsection shall not operate to delay a new filing and the data required by subsection 4, paragraph A, shall only be required for each of the 3 most recent calendar years for which data are available.

13. Procedure; rules. Subject to the applicable requirements of the Maine Administrative Procedure Act, Title 5, chapter 375, the superintendent may adopt rules establishing procedures for the administration of this section, including, procedures governing submission of petitions for intervenor status, prefiling of testimony and exhibits, information requests, subpoenas, prehearing conferences and conduct of hearings.

14. Costs. For the purpose of determining whether a filing meets the requirements of this section, the superintendent may employ outside consultants. The

organization or insurer making the filing shall be responsible for the reasonable costs related to the review of workers' compensation rate filings, including conduct of the hearing.

Maine Revised Statutes Annotated - tit. 10 §1101 (pertinent text only)

§1101. Contracts in restraint of trade

Every contract, combination in the form of trusts or otherwise, or conspiracy, in restraint of trade or commerce in this State is declared to be illegal; provided that no association or corporation organized for the sole purpose of marketing, producing or trucking pulpwood or saw logs, the members of or stockholders in which are actually engaged in the production of such products or selling, cutting or trucking the same shall be deemed to be a conspiracy or a combination or in restraint of trade or an attempt to lessen competition or to fix prices arbitrarily; nor shall the marketing contracts and agreements between such association or corporation and its members or stockholders be considered illegal as such or in unlawful restraint of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose. Whoever shall make any such contract or engage in any such combination or conspiracy shall be guilty of a Class C crime.
R.S.1954, c. 137, §43; 1973, c. 489, §1; 1977, c. 175, §1.

Maine Revised Statutes Annotated - tit. 24-A §§2301, 2302 (pertinent text only)

§2301. Purpose of chapter; interpretation

The purpose of this chapter is to promote the

public welfare by regulating insurance rates, in accordance with the intent of Congress as expressed in Public Law 15 - 79th Congress, to the end that they shall not be excessive, inadequate or unfairly discriminatory, and to authorize and regulate cooperative action among insurers in the rate making and in other matters within the scope of this chapter. Nothing in this chapter is intended to prohibit or discourage reasonable competition, or to prohibit, or encourage except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates, rating systems, rating plans or practices. This chapter shall be liberally interpreted to carry into effect this section. Unless otherwise specified, all hearings held under this chapter shall be in accordance with the procedures set forth in the Maine Administrative Procedure Act, Title 5, chapter 375, subchapter IV.
1969, c. 132, §1, eff. Jan. 1, 1970; 1977, c. 694, §415, eff. July 1, 1978.

§2302. Scope of chapter

* * *

3. Workers' compensation shall first be subject to chapter 25, subchapter II-A, but any other parts of this subchapter not inconsistent with those sections shall also apply.

CITATIONS TO THE STATUTORY PROVISIONS OF 31 OTHER STATES AND THE COMMONWEALTH OF PUERTO RICO WITH STATUTES SUBSTANTIALLY SIMILAR TO ME. REV. STAT. ANN. TIT. 24-A §2301

Alaska Stat. §21.39.010 (1992)
Alaska Stat. §21.57.010 (1992)

Ariz. Rev. Stat. Ann. §20-341 (1992)
Ariz. Rev. Stat. Ann. §20-1601 (1992)

Ark. Code Ann. §23-62-302 (West 1987)

Cal. Ins. Code §779.1 (West 1972 & Supp. 1993)

Colo. Rev. Stat. Ann. §10-10-102
(West 1990 & Supp. 1993)

Del. Code Ann. tit. 18, §2501 (1992)

Haw. Rev. Stat. §431:10B-101 (1992)

Ill. Ann. Stat. ch. 215, para. 5/155.51 (Smith-Hurd 1992)
Ill. Ann. Stat. ch. 215, para. 5/454 (Smith-Hurd 1992)

Iowa Code Ann. §515A.1 (West 1988)
(repealed July 1, 1993)

Kan. Stat. Ann. §40-925 (1991)
Kan. Stat. Ann. §40-1111 (1991)

La. Rev. Stat. Ann. §1402 (West 1992)
La. Rev. Stat. Ann. §4002 (West 1992)

Me. Rev. Stat. Ann. tit. 24-A, §2301 (West 1990 & Supp. 1993)
Me. Rev. Stat. Ann. tit. 24-A, §2852 (West 1990)

Md. Code Ann., Ins. §241 (1992)
Md. Code Ann., Ins. §436C (1992)

Mass. Gen. Laws Ann. ch. 174A, §2 (West 1987)
Mass. Gen. Laws Ann. ch. 175A, §2 (West 1987)

Mich. Comp. Laws Ann. §500.2400 (West 1983)
Mich. Comp. Laws Ann. §500.2600 (West 1983)

Mo. Ann. Stat. §385.010 (Vernon 1991)

Mont. Code Ann. §33-21-102 (1991)

Neb. Rev. Stat. §44-1701 (1992)
Neb. Rev. Stat. §44-5003 (1992)

N.H. Rev. Stat. Ann. §408-A:1 (1991)
N.H. Rev. Stat. Ann. §414:1 (1991)

N.J. Stat. Ann. §17:46B-41 (West 1985)

N.M. Stat. Ann. §59A-25-2 (Michie 1992)

N.D. Cent. Code §26.1-25-01 (1992)

Ohio Rev. Code Ann. §3935.01 (Anderson 1989)
Ohio Rev. Code Ann. §3937.17 (Anderson 1989)

Pa. Stat. Ann. tit. 40, §1007.1 (1992)
Pa. Stat. Ann. tit. 40, §1181 (1992)
Pa. Stat. Ann. tit. 40, §1221 (1992)

P.R. Laws Ann. tit. 26, §1201 (1977)
P.R. Laws Ann. tit. 26, §1801 (1977)

R.I. Gen. Laws §27-6-1 (1992)
R.I. Gen. Laws §27-9-1 (1992)
R.I. Gen. Laws §27-30-1 (1992)
R.I. Gen. Laws §27-31-1 (1992)

S.D. Codified Laws Ann. §58-19-1 (1992)
S.D. Codified Laws Ann. §58-24-1 (1992)

Tenn. Code Ann. §56-35-118 (1992)

Tex. Ins. Code Ann. §3.53 (West 1981 & Supp. 1993)

Vt. Stat. Ann. tit. 8, §4101 (1984)

Va. Code Ann. §38.2-2000 (Michie 1992)

Wash. Rev. Code Ann. §48.34.010 (West 1984)

W. Va. Code §33-20-1 (1992)

(2)

Supreme Court, U.S.
FILED
JUN 23 1993
OFFICE OF THE CLERK

No. 92-1874

In The

Supreme Court of the United States

October Term 1992

SANDY RIVER NURSING CARE CENTER, *et al.*,
Petitioners,

v.

AETNA CASUALTY AND SURETY COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT BRIEF IN OPPOSITION

Richard G. Parker*
O'MELVENY & MYERS
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Counsel for CIGNA Corporation

James vanR. Springer*
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 828-2204

Counsel for Maine Bonding and Casualty Company

John E. Nolan, Jr.*
Mark F. Horning
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for The Aetna Casualty and Surety Company

*(*Counsel of Record)*
(Additional counsel listed on signature page)

BEST AVAILABLE COPY

35 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the federal antitrust laws provide no remedy for price increases resulting from the enactment of state insurance rate legislation, regardless of an allegation that the legislation was "coerced" by conduct of private parties.

2. Whether plaintiffs' alternative appellate theory of an agreement not to deviate below the maximum rates established by the Maine Superintendent of Insurance was foreclosed because it was never presented to the District Court.

3. In the event of a negative answer to question 2, whether the Court of Appeals correctly held that such an agreement would be shielded by the state action doctrine based on (a) statutory authorization similar to those held to satisfy the "clear articulation" requirement in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), and (b) an uncontested showing of active regulatory supervision.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the U.S. Supreme Court Rules of Practice and Procedure, the parent companies and subsidiaries (other than wholly-owned subsidiaries) of each respondent are as follows:

1. **The Aetna Casualty and Surety Company**
Aetna Casualty & Surety of Illinois
The Standard Fire Insurance Company
The Automobile Insurance Company of Hartford

   The parent company of respondent The Aetna Casualty and Surety Company is Aetna Life and Casualty Company. The Aetna Casualty and Surety Company is the parent company of the other respondents. Any and all subsidiaries of these respondents are wholly-owned.

2. **American International Group, Inc.**
American Home Assurance Company
Burmingham Fire Insurance Company of Pennsylvania
Commerce and Industry Insurance Company
The Insurance Company of the State of Pennsylvania
National Union Fire Insurance Company of Pittsburgh, Pennsylvania

   American International Group, Inc. is the parent company of all other respondents. Its subsidiaries which are not wholly-owned are: AIG Real Estate Investment & Management Co., Inc.; AIG Real Estate Investment & Management Co. (P.R.), Inc.; AIG Realty, Inc.; American International Realty

Corp.; Chlyoda Consultants Kabushiki Kaisha; Collinsbrook Building, Inc.; Eastgreen, Inc.; Kapatiran Realty Corporation; PineStarr Realty, Inc. (formerly Davedeb Realty Corporation); Pine Street Brokers Corp.; 206 Sansom Street Corp.; 270 Carpenter Drive Building, Inc.; AIA Capital Corporation; AICCO, Inc.; AIG Capital Corp.; AIG Clearing Corporation; AIG Export Investors, Inc.; AIG Funding, Inc.; AIG Financial Products Corp.; AIG Financial Products (U.K.) Limited; AIG Financial Products (Japan) Limited; AIG Financial Securities Corp.; AIG Financial Securities (U.K.) Limited; AIG Global Investors, Inc.; AIG International Limited; AIG Investment Advisers, Inc.; AIG Investment Corporation; AIAG Investment Corporation (Asia) Limited; AIG Investment Corporation (Japan); AIG Matched Funding, Inc.; AIG Mortgage Finance Co., Inc.; AIG Options, Inc; AIG Trading Corporation; AIG Trading Limited; AIGOF Investments I, Inc. (formerly AIG Overseas Finance Europe, Inc.); AIGOF Investments II, Inc.; AIGOF Investments III, Inc.; AIGOF Spain Holdings, Inc.; A.I. Credit Consumer Discount Company; A.I. Credit Corp.; A.I. Credit Securities Corp.; A.I. Trade Finance, Inc.; American International Fund Distributors, Inc.; Banque A.I.G.; Eurinvest Finance, S.A.; International Lease Finance Corporation; Dempsey & Company, Limited; Pine Street Holdings, Inc.; Trading & Transportation Management, Inc.; Agency Management Corporation; A.I. Lloyds, Inc.; A.I. Lloyds Insurance Company; A.I. Marine Adjusters, Inc.; A.I. Marine Associates of Illinois, Inc.; A.I. Network Corporation; AIG Aviation, Inc.; AIG Aviation (Canada), Inc.; AIG Aviation (Illinois) Corporation; AIG Aviation (Texas),

Inc.; AIG Aviation Adjustment Service, Inc.; AIG Aviation Brokerage, Inc.; AIG Consultants, Inc.; AIG Consultants (U.K.) Ltd.; AIG Equipment Lessors, Inc.; AIG Hawaii Insurance Company, Inc.; AIG Life Insurance Company; AIG Managing General Agency, Inc.; AIG Marketing, Inc.; AIG Overseas Trade Corp.; AIG Research & Development Corp.; AIG Risk Management, Inc.; AIG Risk Management (Illinois), Inc.; AIG Trade Corp.; AIGM Insurance Service, Inc.; AIU Canada Limited; AIU Insurance Company; ALICO, S.A.; Agency Management Corporation; Agency Management Corporation of Arkansas; American Fidelity Company; American Global Insurance Company; American Home Assurance Company; American International Adjustment Company, Inc.; American International Adjustment Co. of Illinois, Inc.; American International Adjustment Company of Nevada, Inc.; American International Assistance Services, Inc.; American International Assurance Company (Bermuda) Limited; American International Assurance Company, Limited; American International Aviation Corporation; American International Company, Limited; American International Corporation, AIU North America, Inc.; AIU North America (Colorado), Inc.; AIU North America (Connecticut), Inc.; AIU North America (Illinois), Inc.; AIU North America (Louisiana), Inc.; AIU North America (Massachusetts), Inc.; AIU North America (New Jersey), Inc.; AIU North America (North Carolina), Inc.; AIU North America (Texas); America International Assistance Services, Inc.; American International Group Data Center, Inc.; American International Health & Rehabilitation Services, Inc.;

American International Healthcare, Inc.; American International Insurance Company; American International Life Assurance Company of New York; AIG Life Insurance Company of Puerto Rico; American International Marketing Systems, Inc.; American International Oil & Gas Corp.; American International Recovery, Inc.; American International Reinsurance Company, Limited; American International Services, Inc.; American International Surplus Lines Agency, Inc.; American International Specialty Lines Insurance Company (formerly Alaska Insurance Company); American International Underwriters Agency Corporation of Texas, Inc.; American International Underwriters Agency, Inc. (Illinois); American International Underwriters Agency (Missouri); American International Underwriters Agency of Ohio, Inc.; American International Underwriters Corporation; American International Underwriters of Louisiana, Inc.; American International Underwriters Overseas, Ltd.; American International Underwriters (West Coast) Inc.; American Life Insurance Company; Birmingham Fire Insurance Company of Pennsylvania; C.A. Servicios de Propiedades; Central Risk Specialists, Inc.; Commerce and Industry Insurance Company; Commerce and Industry Insurance Company of Canada; Delaware American Life Insurance Company; Dwight Tope State Agency, Inc.; Eastern Risk Specialists, Inc.; Florida Risk Specialists, Inc.; Granite State Insurance Company; The Gulf Agency; Hawaii Insurance Consultants, Ltd.; Hawaii Risk Specialists, Inc.; Illinois National Insurance Company; The Insurance Company of the State of Pennsylvania; International Computer Services, Inc.; La In-

teramericana Compania de Seguros Generales (Columbia); La Interamericana Compania de Seguros Generales (Chile); La Interamericana Compania de Seguros de Vida (Chile); Meridional Compania Argentina de Seguros Sociedad Anonima; Landmark Insurance Company; Landmark Insurance Company (U.K.), Ltd.; Lexington Insurance Company; Louisiana Risk Specialists, Inc.; Malaysian American Assurance Company Berhad; Marketpac International, Inc.; American International Facilities Management; Michigan Risk Specialists, Inc.; Midwestern Risk Specialists, Inc.; Morefar Marketing, Inc.; Mt. Mansfield Company, Inc.; NAM, Inc.; NAM, Inc. (Massachusetts); NAM Managers, Ltd.; N.A.M. Managing General Agency, Inc.; Nan Shan Life Insurance Company, Ltd.; National Union Fire Insurance Company of Louisiana; New England Risk Specialists, Inc.; New Hampshire Indemnity Company; New Hampshire Insurance Company; New Hampshire Life Insurance Company; NHIG Holding Corp.; Norgulf, Inc.; North American Managers, Inc.; Northeastern Risk Specialists, Inc.; Northwestern Risk Specialists, Inc.; Pacific Union Assurance Company; Pennsylvania Brokerage Agency, Inc.; Philam Insurance Company, Inc.; The Philippine American Assurance Company, Inc.; The Philippine American General Insurance Company, Inc.; The Philippine American Life Insurance Company; The Philippine American Management and Financing Company, Inc.; Pine Street Management Company; Reciprocal Managers, Inc.; Risk Specialists Companies, Inc.; Risk Specialists Company of the Carolinas, Inc.; Risk Specialists Company of Colorado, Inc.; Risk Specialists Company of

Connecticut, Inc.; AIG Europe, S.A.; Risk Specialists Company of Indiana, Inc.; Risk Specialists Company of Maryland, Inc.; Risk Specialists Company of Minnesota, Inc.; Risk Specialists Company of New Jersey, Inc.; Risk Specialists Company of New York, Inc.; Risk Specialists Company of Ohio, Inc.; Risk Specialists Company of Tennessee, Inc.; Risk Specialist Company of Wisconsin, Inc.; Southern Risk Specialists of Oklahoma, Inc.; Southeastern Risk Specialists, Inc.; Southern Risk Specialists, Inc.; Ueberseebank A.G.; United Guaranty Commercial Insurance Company; United Guaranty Commercial Insurance Company of North Carolina; United Guaranty Corporation; United Guaranty Credit Insurance Company; United Guaranty Residential Insurance Company; United Residential Insurance Company of North Carolina; United Guaranty Services, Inc.; Western Risk Specialists, Inc.

3. **CIGNA Corporation**
Insurance Company of North America
Indemnity Insurance Company of North America
CIGNA Insurance Company
Pacific Employers Insurance Company
CIGNA Property and Casualty Insurance Company (Formerly Aetna Insurance Company)
Century Indemnity Company
CIGNA Fire Underwriters Insurance Company (formerly Aetna Fire Underwriters Insurance Company)

Respondent Insurance Company of North America

is the parent company of respondent Indemnity Insurance Company of North America. Respondent CIGNA Insurance Company is the parent company of Pacific Employers Insurance Company. CIGNA Property and Casualty Insurance Company (formerly Aetna Insurance Company) is the parent company of respondents CIGNA Insurance Company, CIGNA Fire Underwriters Insurance Company (formerly Aetna Fire Underwriters Insurance Company) and Century Indemnity Company. Respondents Insurances Company of North America and CIGNA Property and Casualty Insurance Company are wholly-owned subsidiaries of INA Financial Corporation, which is a wholly-owned subsidiary of INA Corporation. INA Corporation is a wholly-owned subsidiary of CIGNA Holdings, Inc., which is a wholly-owned subsidiary of respondent CIGNA Corporation. Any and all subsidiaries of these respondents are wholly-owned.

4. **Continental Casualty Company**
Transportation Insurance Company
National Fire Insurance Company of Hartford
Transcontinental Insurance Company
American Casualty Company of Reading, Pennsylvania
Valley Forge Insurance Company

Respondent Continental Casualty Company is the direct or indirect corporate parent of each of the other respondents. CNA Financial Corporation is the parent company of respondent Continental Casualty Company. Any and all subsidiaries of these respondents are wholly-owned.

5. ***Commercial Union* Insurance Companies**
Commercial Union Insurance Company
The Northern Insurance Company of America
The Employers' Fire Insurance Company
American Employers' Insurance Company

The parent companies of respondents are Commercial Union plc., Commercial Union Assurance Company plc., Commercial Union Corporation, and Commercial Union of America. Any and all subsidiaries of these respondents are wholly-owned.

6. **Continental Insurance Companies**
Fidelity and Casualty Company of New York
The Continental Insurance Company
Commercial Insurance Company of Newark, NJ
Boston Old Colony Insurance Company
Fireman's Insurance Company of Newark, NJ
The Glens Falls Insurance Company
Kansas City Fire and Marine Insurance
Niagara Fire Insurance Company

The Continental Corporation is the parent of these respondents. Any and all subsidiaries of these respondents are wholly-owned.

7. **The Hanover Insurance Companies**
The Hanover Insurance Company
Citizens Insurance Company of America
Massachusetts Bay Insurance Company

Allmerica Property & Casualty Companies, Inc. is the parent company of respondent Hanover Insurance Company, which is the parent company of

respondent Massachusetts Bay Insurance Company. Citizens Corporation is the parent company of respondent Citizens Insurance Company of America. Any and all subsidiaries of these respondents are wholly-owned.

8. **Hartford Fire Insurance Company**
Hartford Accident and Indemnity Company
Hartford Casualty Insurance Company
Hartford Underwriters Insurance Company
Twin City Fire Insurance Company
Hartford Insurance Company of the Midwest

Respondent Hartford Fire Insurance Company is the parent company of all other respondents. ADAPT, Inc., International Corporate Marketing Group, Inc. and Thoroughbred International Insurance are subsidiaries of Hartford Fire Insurance Company which are not wholly-owned. Any and all subsidiaries of these respondents are wholly-owned. There is no entity named The Hartford as listed in plaintiffs' Amended Complaint.

9. **Maine Bonding and Casualty Company**
Maryland Casualty Company
Northern Insurance Company of New York
Assurance Company of America
Valiant Insurance Company

The parent companies of respondent Maryland Casualty Company are Zurich Insurance Company U.S. Branch and Zurich Holding Company of America, Inc. Respondent Maryland Casualty Company is the parent company of respondents Maine Bonding and Casualty Company, Northern Insurance

Company of New York, Assurance Company of America and Valiant Insurance Company. Maryland Casualty Company has one subsidiary which is not wholly-owned, Zurich American Life Insurance Company. Any and all other subsidiaries of these respondents are wholly-owned.

10. **National Council on Compensation Insurance**

At the time of the appeal herein, National Council on Compensation Insurance was an unincorporated association with a membership of over 600 insurance companies. National Council on Compensation Insurance has since been incorporated, and has no parent company or subsidiary that is not wholly-owned.

11. **Peerless/Netherlands Group**
Peerless Insurance Company
The Netherlands Insurance Company

The parent company of respondents Peerless Insurance Company and The Netherlands Insurance Company is Nationale-Nederlanden U.S. Property & Casualty Holdings, Inc. Any and all subsidiaries of these respondents are wholly-owned.

12. **Royal Insurance Company of America**
American and Foreign Insurance Company
Globe Indemnity Company
Newark Insurance Company
Safeguard Insurance Company
Royal Indemnity Company

The parent company of all of these respondents is Royal Group, Inc. Any and all subsidiaries of these respondents are wholly-owned.

13. **United States Fidelity & Guaranty Company**

U.S.F. & G. Company is the parent company of respondent United States Fidelity & Guaranty Company. Respondent United States Fidelity & Guaranty Company has numerous subsidiaries, the only ones of which are not wholly-owned are AP Apartments, Inc., Ballston U.S.F. & G. Holding Company, Inc., Intercostal Sunrise Hotel Realty, Inc., and TNP Office, Inc.

14. **The Travelers Insurance Company**
Bankers and Shippers Insurance Company of New York
The Charter Oak Fire Insurance Company
The Travelers Indemnity Company of America
The Travelers Indemnity Company of Illinois
The Travelers Indemnity Company of Rhode Island
The Phoenix Insurance Company
The Travelers Indemnity Company

The Travelers Corporation is the parent company of respondents The Travelers Insurance Company and The Travelers Indemnity Company. The Travelers Insurance Company has one subsidiary which is not wholly-owned, Applied Expert Systems, Inc. The Travelers Indemnity Company has two subsidiaries which are not wholly-owned, Commercial Insurance Resources, Inc. and La Metropole S.A.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.1 STATEMENT ii

TABLE OF CONTENTS xiii

TABLE OF AUTHORITIES xiv

STATEMENT 1

REASONS FOR DENYING THE PETITION 6

I. THE REJECTION OF PETITIONERS' "COERCED LEGISLATION" THEORY WAS A STRAIGHTFORWARD APPLICATION OF THIS COURT'S STATE ACTION DECISIONS AND RAISES NO ISSUE WARRANTING FURTHER REVIEW 6

II. PLAINTIFFS' ALLEGED CONSPIRACY NOT TO DEVIATE IS FORECLOSED AS NOT RAISED BELOW AND FAILS UNDER THIS COURT'S WELL-ESTABLISHED STATE ACTION PRECEDENTS 9

A. Plaintiffs Did Not Present Their Non-Deviation Conspiracy Claim To The District Court 9

B. The "Conspiracy Not To Deviate" Theory Raises No State Action Issue That Has Not Been Decided By The Court And Its Rejection By The Court Of Appeals Creates No Conflict With Any Other Circuit 10

CONCLUSION 17

TABLE OF AUTHORITIES

CASES Page

Allied Tube & Conduit Corp. v. Indian Head, Inc.,
486 U.S. 492 (1988).....6

Associated General Contractors, Inc. v. California State Council of Carpenters,
459 U.S. 519 (1983).....9

Boone v. Redevelopment Agency of San Jose,
841 F.2d 886 (9th Cir.),
cert. denied, 488 U.S. 965 (1988).....13

Brown v. Ticor Title Ins. Co.,
982 F.2d 386 (9th Cir. 1992).....14-16

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).....*passim*

City of Columbia v. Omni Outdoor Advertising, Inc.,
111 S. Ct. 1344 (1991).....*passim*

Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,
365 U.S. 127 (1961).....3-4, 6, 8

FTC v. Superior Court Trial Lawyers Ass'n,
493 U.S. 411 (1990).....4, 6, 7

FTC v. Ticor Title Ins. Co.,
112 S. Ct. 2169 (1992).....10, 15-16

Hoover v. Ronwin,
466 U.S. 558 (1984).....6-8

Jacobs, Visconsi & Jacobs Co. v. City of Lawrence,
927 F.2d 1111 (10th Cir. 1991).....13

Page

Oberndorf v. City and County of Denver,
900 F.2d 1434 (10th Cir.),
cert. denied, 498 U.S. 845 (1990).....13

Parker v. Brown,
317 U.S. 341 (1943).....3-4, 6, 8

Patrick v. Burget,
486 U.S. 94 (1988).....10

Salve Regina College v. Russell,
499 U.S. 225 (1991).....16

Sandy River Nursing Care Center, et al. v. Aetna Casualty and Surety Company, et al.,
985 F.2d 1138 (1st Cir. 1993).....3, 14, 16

Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985).....*passim*

Town of Hallie v. City of Eau Claire,
471 U.S. 34 (1985).....10, 12-13

Traweek v. City and County of San Francisco,
920 F.2d 589 (9th Cir. 1990).....13, 16

STATUTES AND REGULATIONS

15 U.S.C. § 15 (Clayton Act, § 4) (1988).....8

Fed. R. Civ. P. 56(e).....10

Fed. R. Civ. P. 56(f).....10

Me. Rev. Stat. Ann. tit. 24-A, § 2301 (West 1988).....14-15

Me. Rev. Stat. Ann. tit. 24-A, § 2366 (West 1988).....14

Page

MISCELLANEOUS

ABA Antitrust Law Section, *Antitrust Law Developments* (3d ed. 1992) 7

P. Areeda & H. Hovenkamp, *Antitrust Law* (1991 Supp.) 7

In The

Supreme Court of the United States

October Term 1992

No. 92-1874

SANDY RIVER NURSING CARE CENTER, *et al.*,
Petitioners,

v.

AETNA CASUALTY AND SURETY COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT BRIEF IN OPPOSITION

Respondents (all defendants below) respectfully submit that the Petition should be denied because the District Court and the Court of Appeals were correct and because there are no special or important reasons to grant certiorari.

STATEMENT

In November 1987 the Maine Legislature enacted a statute ("1987 Act") repealing rate ceilings for workers' compensation insurance that had been imposed by legislation enacted in 1985 ("1985 Act"). The 1987 Act also authorized workers' compensation insurers (as the 1985 Act had not) to submit rate proposals jointly to the Maine Superintendent of Insurance for his approval. After the 1987 Act became effective, insurers requested regulatory approval for higher rates through their collective ratemaking organization, the National Council on

Compensation Insurance (NCCI). Following vigorously contested public hearings, the Superintendent approved increases which were considerably smaller than requested by NCCI, effective as of January 1988. Having had their rates suppressed by rate ceilings for the preceding several years, insurers raised substantially all of their workers' compensation rates to the maximum levels permitted by the Superintendent.

Petitioners are Maine employers who seek to recover, as antitrust damages, the difference between the workers' compensation premiums permitted by the 1987 Act, as implemented by the Superintendent's several ratesetting Orders, and the premiums to which the insurers would have been limited had the 1985 Act's rate ceilings continued in effect. Their claim is based on the allegation that the 1987 Act resulted from

> a conspiracy designed to coerce the State of Maine to repeal the 1985 legislation and to permit rate increases in excess of those permitted by the 1985 legislation. The conspiracy included an agreement to withdraw from the Maine market, and to intimidate and coerce other insurance companies to similarly withdraw from the market.

Complaint ¶ 34, Pet. App. A59.[1]

The Complaint identifies those injured by the alleged conspiracy to coerce the legislature as employers who paid "the higher rates for workers' compensation insurance which resulted from defendants' unlawful conspiracy." Complaint ¶ 55, Pet. App. A68. Plaintiffs do not seek any relief for direct marketplace injury from the alleged conspiracy to coerce the legislature by withdrawing from the market — *i.e.*, no plaintiff requested damages or other relief due to unavailability of coverage or the payment of higher prices during the alleged boycott period.

[1]References to Pet. App. A____ are to the Appendix to the Petition.

Defendants moved for summary judgement on the ground that the antitrust laws could provide no remedy for price increases resulting from state legislation and regulatory action. The District Court granted the motion. Relying upon the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), and the corollary doctrine of *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the District Court held that conduct which injures plaintiffs only by reason of governmental action is not cognizable under the antitrust laws. As the District Court observed, "[p]laintiffs' alleged injury is directly traceable to the 1987 legislation and to the approval of rate increases by the Maine Superintendent of Insurance." Order And Memorandum of Opinion, Pet. App. A23, A27.[2]

Plaintiffs appealed to the Court of Appeals for the First Circuit. In addition to their allegation of a boycott intended to coerce passage of the 1987 law, plaintiffs' brief on appeal added a conspiracy theory that had not been argued to the District Court: that defendants allegedly agreed to refrain from exercising their statutory option to "deviate" downward from the maximum rates established by the Superintendent of Insurance under the 1987 Act.

The Court of Appeals affirmed the grant of summary judgment.[3] *First*, it held that plaintiffs' "coerced legislation" theory is barred by this Court's recent reaffirmation, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991), that an act of government (here, the legislature's

---

[2]There is an error in the reproduction of the District Court's opinion in the Appendix to the Petition — pages A27 and A28 should be reversed.

[3]The decision of the Court of Appeals, *Sandy River Nursing Care Center, et al. v. Aetna Casualty and Surety Company, et al.*, 985 F.2d 1138 (1st Cir. 1993) ("*Sandy River*"), is set forth at Pet. App. A3-A22.

removal of rate ceilings) cannot be the basis for an antitrust claim, whatever its origin: "Allegations of coercion, like those of conspiracy, implicate only the off-limits issue of the legislators' motivation." Pet. App. A15.

The Court of Appeals emphasized that it was not holding the alleged boycott immune in itself and that such a boycott, if proved, would be *per se* illegal. It further stated that persons directly injured in the marketplace by such conduct could obtain an injunction and collect damages for injury during the period of the boycott. Pet. App. A12-A13. However, these plaintiffs "explicitly have disclaimed any request for relief based on injury occurring while the boycott was in place . . . ." Pet. App. A13. It is the lack of any such claim of direct marketplace injury from the alleged boycott, the court held, that differentiates this case from *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), on which plaintiffs have principally relied throughout this proceeding.

In *Trial Lawyers*, the court noted, the boycott "directly affected" the marketplace, independent of any municipal action, by "constricting the supply of lawyers available to represent indigent criminal defendants." Pet. App. A12. This case, in contrast, is "fully embrace[d]" by *Omni*, where the decisive factor was that the direct cause of the claimed injury was the action of the state itself and where this Court held that the *Parker v. Brown* doctrine and its *Noerr* corollary forbid looking behind the state's action to determine whether that action was the product of a conspiracy. Pet. App. A15.

Second, with respect to the newly alleged "conspirary not to deviate", the Court of Appeals questioned whether the claim was properly raised because it

> never was offered to the district court; indeed, . . . plaintiffs expressly disclaimed the new statute's relevance to the *Parker* issue. The conspiracy

> achieved success, plaintiffs asserted, when the State enacted the law allowing higher premiums. Led by these arguments, the district court never considered whether the defendants could be held responsible for the rate increases — despite authorization of those rates by the state — if they had conspired not to deviate below the maximum rate.

Pet. App. A18 (citation omitted). The court concluded that the new claim "is in any event unavailing" because such a conspiracy would be exempt from the antitrust laws under the state action doctrine. *Id.*

The Court of Appeals held that the 1987 Act affirmatively expressed a policy displacing competition with regulation, thus satisfying the first prong of the two-part state action test established in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). By authorizing the insurance industry to propose rates collectively, and by placing final decisions on rates in the hands of the Superintendent, "the 1987 Act endorsed cooperative ratesetting and anticipated that most, if not all, insurers [choosing to engage in joint ratemaking] would charge the newly authorized rates." Pet. App. A21-A22. Plaintiffs' alleged "conspiracy not to deviate" from the joint rate thus alleged no conduct that was not a product of the statutory policy in favor of uniform rates. *Id.* Moreover, the 1987 Act had repealed the 1985 Act's prohibition against insurer agreements to adhere to uniform rates; this repeal confirmed that an agreement to adhere to the joint rate was authorized by the new law. *Id.* A19. In short, the court regarded the Maine statute as indistinguishable from the joint ratemaking laws found to "clearly articulate" the displacement of competition in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985). Pet. App. A20-A21.

Regarding the second prong of the *Midcal* test, the Court of Appeals determined that defendants' ratemaking activities were "actively supervised" through the ratesetting activities of the Superintendent of Insurance. Pet. App. A19, A21. The appellate court also emphasized that "plaintiffs expressly acknowledge[d] that *Midcal* is satisfied with respect to the[se] ratemaking proceedings." *Id.* A21.

REASONS FOR DENYING THE PETITION

I. THE REJECTION OF PETITIONERS' "COERCED LEGISLATION" THEORY WAS A STRAIGHTFORWARD APPLICATION OF THIS COURT'S STATE ACTION DECISIONS AND RAISES NO ISSUE WARRANTING FURTHER REVIEW.

Petitioners do not contend that there is any conflict in the lower courts with respect to their coerced legislation theory. The best they can do is to suggest that it was not addressed in *Trial Lawyers* and that it is "important".

Plaintiffs' theory was not addressed in *Trial Lawyers* because, as the courts below correctly held, *Trial Lawyers* is a fundamentally different case from this one. The premise of the coerced legislation theory was, however, addressed and rejected in *Omni* and, earlier, in *Hoover v. Ronwin*, 466 U.S. 558 (1984). Both *Omni* and *Hoover* are links in a fifty-year unbroken chain of cases uniformly holding that antitrust claims may not be premised on injury resulting from governmental action. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Parker v. Brown*, 317 U.S. 341 (1943). Petitioners' claim is directly at odds with this consistent rule and does not merit review by this Court.

In *Trial Lawyers*, the issue was whether an economic boycott that caused direct marketplace injury (independent of governmental action) could be excused under the First Amendment because the purpose of the boycott was to induce governmental action. 493 U.S. at 414. The decisive factor in the Court's decision was the direct marketplace impact of the boycott: "The restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted." 493 U.S. at 425.[4]

In this case, the question is whether an alleged boycott, whose only alleged economic impact occurred as a result of the legislative action it supposedly induced and subsequent decisions of a state regulator, is remediable at all under the antitrust laws. The defense here is based not on the First Amendment, but on the state action doctrine's bar against application of the antitrust laws to actions of the state.

That bar, as the Court of Appeals held, Pet. App. A14-A15, precludes plaintiffs' quest for recovery from "coerced" state legislation. Citing *Hoover*, this Court in *Omni*

> reaffirm[ed] our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on "perceived conspiracies to restrain trade," *Hoover*, 466 U.S. at 580. We reiterate that, with the possible [government as] market participant exception, *any* action that qualifies as state action is "*ipso*

[4]Commentators agree that the decisive characteristic of the trial lawyers' boycott was that its anticompetive effects "were a result not of the government's independent action, but rather of the action of the respondents," P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 201 at 15 (1991 Supp.), and that the "source of the harm was the private boycott, not action by a governmental body," ABA Antitrust Law Section, *Antitrust Law Developments* 996 (3d ed. 1992).

> *facto* . . . exempt from the operation of the antitrust laws," *id.* at 568.

111 S. Ct. at 1353.[5] Nor are private parties liable for the consequences of state action which they allegedly have induced, for "*Parker* and *Noerr* generally present two faces of the same coin." *Id.* at 1355.

As in *Hoover* and *Omni*, the issue here is not one of standing or proximate cause under section 4 of the Clayton Act, 15 U.S.C. § 15 (1988), but of the scope of the antitrust laws. The Court of Appeals emphasized that petitioners could have sued under section 4 if they had alleged direct marketplace injury from the alleged boycott. The basis for its affirmance, following *Hoover* and *Omni*, was that the antitrust laws do not apply at all to claims of harm caused by state action as distinguished from private action directly impacting the marketplace.

Petitioners' argument that the decision below would eliminate any "disincentive to conspire" by allowing unlawful boycotts to go unpunished, Petition at 14, ignores the full import of the opinion. The Court of Appeals characterized the conduct alleged as a *per se* violation of the antitrust laws and warned that any actual denial of insurance coverage or other marketplace effects resulting from such a boycott could, if proven, be remedied by treble damages and an injunction. The decision was simply an application of the principle, well established in this Court, that the antitrust laws apply to the

---

[5]Inquiry into petitioners' allegations that legislators voted for the 1987 Act only because they were "coerced" by respondents' alleged conspiratorial acts would require just "the sort of deconstruction of the governmental process and probing of the official 'intent' that [this Court has] consistently sought to avoid." 111 S. Ct. at 1352. Moreover, petitioners' Complaint in effect asked the District Court to undo the rate increases legislated by the State in 1987 through an antitrust damage award; indeed, it would have done so three times over.

marketplace effects of private anticompetitive activity and not to the effects of state action.

II. PLAINTIFFS' ALLEGED CONSPIRACY NOT TO DEVIATE IS FORECLOSED AS NOT RAISED BELOW AND FAILS UNDER THIS COURT'S WELL-ESTABLISHED STATE ACTION PRECEDENTS.

A. Plaintiffs Did Not Present Their Non-Deviation Conspiracy Claim To The District Court.

Plaintiffs' claim of a "conspiracy not to deviate" from joint rates approved after enactment of the 1987 Act, as the Court of Appeals repeatedly noted, was not presented until appeal. Pet. App. A16, A17, A18. The sole theory of conspiracy actually argued in the District Court was a boycott that occurred before passage of the 1987 Act. Contrary to their appellate claim of a conspiracy to avoid the "deviation" provisions of the 1987 Act, plaintiffs in the District Court "expressly disclaimed the new statute's relevance to the *Parker* issue." Pet. App. A18. Petitioners are confined to the claims presented to the District Court, which forecloses review of their afterthought conspiracy. *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526, 528 n.17 (1983).

Consistent with plaintiffs' disclaimer of reliance on the 1987 Act, they raised no issue concerning its implementation in response to defendants' summary judgment motion. Defendants submitted an affidavit of Maine's former Superintendent of Insurance describing his implementation of the 1987 Act, as well as materials detailing the regulatory hearings in which he considered defendants' rate proposals. Plaintiffs did not

challenge these materials and did not seek discovery under Fed. R. Civ. P. 56(f) regarding implementation of the "deviation" provision (or any other matter). Plaintiffs submitted no contradictory evidence under F. R. Civ. P. 56(e) and conceded in their briefs that these ratemaking proceedings met the "active supervision" standard. Pet. App. A21.

In sum, the appellate court could have affirmed summary judgment without addressing the "deviation" claim substantively because (i) plaintiffs failed to plead and to argue any such claim in the District Court and (ii) plaintiffs raised no issue concerning the regulatory implementation of the 1987 Act. Both of these factors strongly counsel against review by this Court of the eleventh-hour state action theory presented by petitioners.

B. The "Conspiracy Not To Deviate" Theory Raises No State Action Issue That Has Not Been Decided By The Court And Its Rejection By The Court Of Appeals Creates No Conflict With Any Other Circuit.

On five occasions in the past eight terms, this Court has elaborated on the "authorization" and "active supervision" standards for applying state action immunity first set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). *See FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991); *Patrick v. Burget*, 486 U.S. 94 (1988); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). Petitioners nevertheless contend that a sixth revisiting of *Midcal* is necessary because of a supposed conflict over "the degree of specificity of state authorization required for a finding that a private

party's particular anticompetitive activity" meets "the first prong of *Midcal*." Petition at 10. The governing authorization standards were, in fact, established in *Southern Motor Carriers* and were faithfully applied by the Court of Appeals here.

Southern Motor Carriers decided the precise "specificity" issue framed by plaintiffs. It held that "[a] private party acting pursuant to an anticompetitive regulatory program need not 'point to a specific, detailed legislative authorization' for its challenged conduct." 471 U.S. at 64 (citation omitted); *see also id.* at 65 ("if the State's intent to establish an anticompetitive regulatory program is clear, . . . the State's failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws"). The Court of Appeals decision here is precisely congruent with the *Southern Motor Carriers* analysis.

The four states involved in *Southern Motor Carriers* authorized collective ratemaking but did not compel it because each allowed individual companies unilaterally to file for rates lower than those approved in response to joint rate filings. 471 U.S. at 59. The Justice Department argued that the absence of compulsion with respect to collectively set rates showed that the states did not intend to displace competition as *Midcal* requires. Plaintiffs here similarly argue that an exception in the 1987 Act allowing "deviations" below the Superintendent-approved maximum rate indicates that the alleged agreement not to deviate from that rate is not authorized.

The Court in *Southern Motor Carriers* rejected this argument. The laws of the relevant states did displace competition by acknowledging the expectation that "[m]ost common carriers probably will engage in collective ratemaking." 471 U.S. at 59. The Court of Appeals here similarly concluded that the 1987 Act "anticipated that most, if not all, insurers would charge the newly authorized rates." Pet. App. A22.

Because the states' policy was preponderantly one of displacing competition, the Court in *Southern Motor Carriers* determined that this policy was not negated merely because some "carriers individually may submit lower proposed rates to the [regulatory] Commission in order to obtain a larger share of the market." 471 U.S. at 59. The Court of Appeals here similarly concluded that the option to file rate "deviations" below the collectively set rate did not alter the fundamentally noncompetitive nature of Maine's policy under the 1987 Act. The court correctly perceived that the authorization standard proposed by plaintiffs would be satisfied only if Maine had compelled universal use of the joint rate. This, in substance, is the same "compulsion" theory rejected in *Southern Motor Carriers* as transgressing the principle of federal deference to state regulation. Pet. App. A20-A21.

In *Town of Hallie*, which was decided concurrently with *Southern Motor Carriers*, this Court elaborated on the regulatory regime that would reflect an intention to displace competition. In *Town of Hallie*, as recently explained in *Omni*, this Court "rejected the contention that [the first prong of *Midcal*] can be met only if the delegating statute explicitly permits the displacement of competition." 111 S. Ct. at 1350 (citing *Town of Hallie*, 471 U.S. at 41-42). "It is enough," this Court held, "if suppression of competition is the foreseeable result of what the state authorizes." *Id.* (quoting *Town of Hallie*, 471 U.S. at 42).

Plaintiffs' contention that the "conspiracy not to deviate" is not protected because it was not specifically authorized flies in the face of the expansive formulation of the standard set forth in *Town of Hallie* and in the *Southern Motor Carriers* holding that "[r]equiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness." 471 U.S.

at 64. In fact, in *Southern Motor Carriers*, this Court afforded state action immunity on the basis of state regulatory policies in Mississippi that were far less "express" in their authorization than those here. The Mississippi statutes subjected rates to regulation but were silent on collective ratemaking. 471 U.S. at 62-65. The Court, nonetheless, held that the state need not "specifically address[] collective ratemaking" if the overall regulatory scheme evidences an intent to displace competition with regulation. 471 U.S. at 67. The Mississippi statute did so because it subjected rates to state approval under a "just and reasonable" standard and because the state's regulatory agency authorized collective ratemaking. *Id.*

The 1987 statutes here displace the marketplace by subjecting defendants' rates to a " '[j]ust and reasonable' " standard, as in Mississippi. Pet. App. A19. They also expressly authorize joint rate filings and repeal a provision from previous law disallowing agreements to adhere to filed rates. These factors fall well within the authorization parameters set forth in *Southern Motor Carriers* and *Town of Hallie*. As the Court of Appeals held, Maine necessarily "condon[es] an agreement among insurers to charge the rates they jointly propose, subject to approval by the Superintendent," Pet. App. A19, which necessarily means that such insurers will not deviate by charging a lower rate. *Id.*

The circuit court conflict asserted by plaintifffs is nonexistent. In four of the five cases characterized as "inconsistent" with the decision below,[6] Petition at 10 nn. 7-8, the courts applied the *Midcal* standards and found sufficient state authori-

---

[6] *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 927 F.2d 1111 (10th Cir. 1991); *Oberndorf v. City and County of Denver*, 900 F.2d 1434 (10th Cir.), *cert. denied*, 498 U.S. 845 (1990); *Traweek v. City and County of San Francisco*, 920 F.2d 589 (9th Cir. 1990); *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886 (9th Cir.), *cert. denied*, 488 U.S. 965 (1988).

zation for the challenged activity. Hence, there can be no conflict with these cases.

The only circuit decision identified by plaintiffs rejecting state action immunity, *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), does not reflect any disagreement between the First and Ninth Circuits on the applicable legal standards, which both courts acknowledged were set in *Midcal*. Pet. App. A20; 982 F.2d at 392. The differing outcomes in *Brown* and *Sandy River* are attributable to substantial differences in the regulatory systems in the states involved there and those of the state of Maine.[7]

With regard to Arizona, one of the two states involved in *Brown*, the Ninth Circuit focused on a single statutory provision that it interpreted to mandate a competitive system in the absence of "anything in the statute or legislative history to show a contrary intent." 982 F.2d at 393. In Maine, the undisputed statutory and regulatory record *does* show a contrary intent. Joint action on rates was the predominant form of ratemaking under the 1987 Act. The Superintendent testified that "no rate 'deviations' are permitted in the residual market" *i.e.*, uniform rates must be charged without exception.[8] Affidavit of Joseph A. Edwards ¶¶ 14, 15. With respect to the so-called "voluntary" market, the Superintendent interpreted

---

[7]It should also be noted that petitioners never cited *Brown* (or any of the other allegedly conflicting decisions) to the Court of Appeals, or made any reference whatever to the subsection of the 1987 Act (Me. Rev. Stat. Ann. tit. 24-A § 2301 (West 1988)) which they now contend so clearly mandates rate competition and which they accuse the Court of Appeals of interpreting inconsistently with *Brown*. Petition at 5, 22. The Petition thus offers an afterthought upon an afterthought.

[8]The Maine statute establishes a "residual market mechanism" in which all insurers are required to participate for purposes of affording coverage to employers unable to obtain it from individual insurers underwriting in the so-called "voluntary" market. Me. Rev. Stat. Ann. tit. 24-A, § 2366 (West 1988).

the statute to "substantially disfavor[] and restrict[] pricing competition" and supported a "single, state-wide filing" because a "unified scheme of pricing enables the Superintendent . . . to thoroughly examine the reasonableness of proposed rates." Edwards Aff. ¶¶ 24, 26, 27.

Moreover, the 1987 Act *repealed* a provision that disallowed agreements among insurers to use only jointly filed workers' compensation rates, the very sort of agreement alleged here. Indeed, the statutory provision quoted in the Petition, Petition at 15, also states that "[n]othing in this chapter is intended to discourage . . . uniformity in insurance rates." Me. Rev. Stat. Ann. tit. 24-A, § 2301 (West 1988). In short, the Maine statute, in conjunction with the undisputed regulatory record in this case, is decisively distinguishable from the record in *Brown* and compels the conclusion that the first prong of *Midcal* has been met.

This Court has previously ruled that Wisconsin, the second state involved in *Brown*, did not "actively supervise" title search fees. *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2179 (1992). Under Wisconsin's so-called "negative option" scheme, proposed rates would go into effect automatically if the Commissioner of Insurance did not actually disapprove them. Maine, in contrast, subjects workers' compensation rates to thorough, on-the-record scrutiny. In the present case, after public hearings in which defendants' filings were vigorously opposed, the Superintendent issued lengthy decisions rejecting those proposals in favor of substantially lower rates. Pet. App. A7. The Court of Appeals accordingly "fail[ed] to see how it could be illegal price fixing for [defendants] to agree to charge the rates allowed by the state, particularly when the approved rates fall below the jointly proposed rates." *Id.* A19.

In sum, *Brown* and *Sandy River* do not conflict on interpretation of the *Ticor* "active supervision" standard; they reflect only differences in the vigor with which Maine on the one hand, and Arizona and Wisconsin on the other, examine the rate filings in issue. The very most that could conceivably be made of differences between the decisions is their varying interpretations of state insurance ratemaking laws,[9] not any disagreement over the applicable state action standards.[10] Conflicting interpretations of different state statutes do not present any question suitable for this Court's review.

---

[9]There is no reason for this Court to second guess the Court of Appeals in a matter of how to interpret Maine law. *Cf. Salve Regina College v. Russell*, 499 U.S. 225 (1991) (citing *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956) (emphasizing primary role of lower court judges in interpreting state law)).

[10]The Petition erroneously describes the Ninth Circuit's "two-step" analysis for application of the first prong of *Midcal* as substantively different from the "one-step" test employed by the First Circuit. Petition at 22-23. The Ninth Circuit itself has employed a "one-step" analysis and has also recognized that "[a]nalytically, all the tests are similar and address the same concerns." *Traweek v. City and County of San Francisco*, 920 F.2d 589, 591 n.1 (9th Cir. 1990).

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

Dated June 23, 1993

John E. Nolan, Jr.*
Mark F. Horning
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

-and-

James E. Kaplan
JAMES E. KAPLAN & ASSOCIATES, P.A.
Four Canal Plaza
P.O. Box 386
Portland, ME 04112-0386
(207) 773-6300

Counsel for The Aetna Casualty and Surety Company

Fredric W. Yerman*
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, NY 10022
(212) 836-8000

Counsel for American International Group, Inc.

Richard G. Parker*
O'MELVENY & MYERS
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Counsel for CIGNA Corporation

Michael L. McCluggage*
WILDMAN, HARROLD, ALLEN & DIXON
225 West Wacker Drive
Chicago, IL 60606-1229
(312) 201-2000

Counsel for CNA Insurance Companies

Harold J. Friedman*
FRIEDMAN & BABCOCK
Six City Center
P.O. Box 4726
Portland, ME 04112
(207) 761-0900

Counsel for Commercial Union

Stanley B. Block*
VEDDER, PRICE, KAUFMAN & KAMMHOLZ
222 North LaSalle Street
Chicago, IL 60601-1003
(312) 609-7580

Counsel for Continental Insurance Companies

Robert S. Frank*
VERRILL & DANA
One Portland Square
P.O. Box 586
Portland, ME 04112
(207) 774-4000

Counsel for The Hanover Insurance Companies

William A. Montgomery*
William A. Hannay
SCHIFF HARDIN & WAITE
7200 Sears Tower
Chicago, IL 60606
(312) 876-1000

Counsel for Hartford Fire Insurance Company

James vanR. Springer*
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 828-2204

Counsel for Maine Bonding and Casualty Company

Paul H. Friedman*
ARTER & HADDEN
1801 K Street, N.W.,
Ste. 400K
Washington, D.C. 20006
(202) 775-7128

-and-

Joseph E. Coughlin
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, IL 60603
(312) 443-0343

Counsel for National Council on Compensation Insurance

John J. Flaherty*
Randall B. Weill
PRETI, FLAHERTY, BELIVEAU & PACHIOS
443 Congress Street
Portland ME 04101
(207) 775-5831

Counsel for Peerless Insurance Company and the Netherlands Group

Alfred C. Frawley*
BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, ME 04243
(207) 786-3566

Counsel for Royal Insurance Company of America

Peter J. Rubin*
BERNSTEIN, SHUR, SAWYER & NELSON
100 Middle Street
P.O. Box 9729
Portland, ME 04104-5029
(207) 774-1200

Counsel for The Travelers Insurance Company

Lewis A. Noonberg*
PIPER & MARBURY
1200 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 861-3900

Counsel for United States Fidelity and Guaranty Company

**Counsel of Record*

(3)

Supreme Court, U.S.
FILED
JUN 22 1993
OFFICE OF THE CLERK

No. 92-1874

In The

Supreme Court of the United States

October Term, 1992

SANDY RIVER NURSING CARE CENTER, *et al.*,

Petitioners,

v.

AETNA CASUALTY AND SURETY COMPANY, *et al.*,

Respondents.

Petition For A Writ of *Certiorari*
To The United States Court Of Appeals
For The First Circuit

BRIEF OF THE STATE OF MAINE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

MICHAEL E. CARPENTER
Attorney General

STEPHEN L. WESSLER
Deputy Attorney General
(Counsel of Record)

FRANCIS E. ACKERMAN
Assistant Attorney General
Department of Attorney General
Consumer & Antitrust Division
State House Station 6
Augusta, Maine 04333
(207) 626-8800

THOMAS D. WARREN
Deputy Attorney General
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

19 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. INTRODUCTION 5

II. THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH THIS COURT'S HOLDING IN TICOR 8

A. *The Court Of Appeals Erred In Ruling That A State's "Implicit Condonation" Of Anticompetitive Conduct Is Equivalent To Explicit State Policy Favoring Such Conduct* 9

B. *The Court Of Appeals Erred In Finding Active Supervision Of An Alleged Private Agreement Of Which The Ratesetting Agency Was Not Even Aware* 11

III. THE ERROR INTO WHICH THE COURT OF APPEALS HAS FALLEN CARRIES BROAD IMPLICATIONS FOR FUTURE LITIGATION, STATE REGULATION AND THE BALANCE OF FEDERALISM 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) ..... *passim*

Federal Trade Commission v. Ticor Title Insurance Company, 112 S.Ct. 2169 (1992)..... *passim*

Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)..... 11

Parker v. Brown, 317 U.S. 341 (1943).....1, 2

Patrick v. Burget, 486 U.S. 94 (1988) 12

Sandy River Nursing Care v. Aetna Casualty, 985 F.2d 1138 (1st Cir. 1993)..... *passim*

Sandy River Nursing Care v. National Council on Compensation Insurance, 798 F.Supp. 810 (D.Me.1992) ..... *passim*

Southern Motor Carriers Rate Conference v. U.S., 471 U.S. 48 (1985) 9

RULES AND REGULATIONS

Supreme Court Rule 37.5 1

STATUTES

Me.Rev.Stat.Ann. title 10, §1101 (1980)..... 2

Me.Rev.Stat.Ann. title 24-A, §2301 (1988) 1, 6, 10

Me.Rev.Stat.Ann. title 24-A, §2362 (1988) 1, 5

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITY

R. Langer, *The States Will Continue To Be Players In The Development Of Antitrust Policy,* Antitrust Report, May 1993 11

STATEMENT OF INTEREST

The State of Maine (the "State") submits this brief by its Attorney General as *amicus curiae*, pursuant to Supreme Court Rule 37.5, in support of the pending petition for *certiorari*. In the State's view, the decision of the Court of Appeals below misconstrued and misapplied antitrust law as laid down by this Court in *Federal Trade Commission v. Ticor Title Insurance Company*, 112 S.Ct. 2169 (1992).

Specifically, the Court of Appeals erroneously concluded that a private agreement by workers' compensation insurance carriers not to discount from a jointly filed maximum rate approved by the ratesetting agency fell within the "state action immunity" conferred by *Parker v. Brown*, 317 U.S. 341 (1943), despite the fact that the alleged agreement actually *contravened*[1] clearly articulated state policy, and despite the additional fact that nothing in the record suggests that the alleged agreement was reviewed, authorized or supervised by the ratesetting agency in any fashion. The decision below is thus in open conflict with this Court's recent explanation of the principles of state action immunity in *Ticor*. Indeed, the Court of Appeals completely failed to consider the impact of *Ticor*.

---

[1] The statute provides: "Nothing in this chapter is intended to prohibit or discourage reasonable competition, or to prohibit or encourage except to the extent necessary . . . uniformity in insurance rates." Me.Rev.Stat.Ann. title 24-A, §2301 (1988), Appendix ("App.") 91. The statute further explicitly permits discounting from the maximum set by the agency, Me.Rev.Stat.Ann. title 24-A, §2362 (1988), App. 80.

For these reasons, the State believes that this case is appropriate for plenary review. In the alternative, the Court could consider a summary reversal of the decision below, with a remand for reconsideration in light of *Ticor*. In our view, if the decision below goes uncorrected, it will frustrate clear state policy favoring competition, with the result that higher workers' compensation insurance rates will be passed on to Maine consumers. In addition, the decision will promote uncertainty in the law, encourage unnecessary litigation, hamper the State's antitrust enforcement program and impede the State's ability to select and design effective regulatory programs.

The State, through its Attorney General, is charged with enforcement of Maine's "mini-Sherman Act", Me.Rev.Stat.Ann. title 10, §1101 (1980), which, like its federal counterpart, bars contracts or combinations in restraint of trade, including price-fixing agreements. The resources which the State is able to devote to antitrust enforcement are quite limited. In the context of its enforcement program, the State regularly encounters claims of state action immunity under *Parker v. Brown*. The State is concerned that the Court of Appeals' decision in this case will promote uncertainty in the law and thereby encourage unnecessary litigation, with negative consequences for the State's antitrust enforcement program.

In addition, the expansive reading of state action immunity which characterizes the Court of Appeals' decision in this case raises precisely the same federalism concerns argued by the *amici* states in *Ticor*. This Court concluded that those concerns were well-founded, recognizing that "[i]f the States must act in the shadow of

state-action immunity whenever they enter the realm of economic regulation, then our doctrine will impede their freedom of action, not advance it". *Ticor*, 112 S.Ct. at 2178.

The State's purpose as *amicus curiae*, therefore, is to urge this Court to act on the pending petition so as to permit the errors we perceive in the Court of Appeals' opinion to be duly and timely corrected, whether by this Court, or by the Court of Appeals itself upon summary remand.

SUMMARY OF ARGUMENT

The Maine workers' compensation statute provides for collective applications by insurance carriers, pursuant to which the ratesetting agency establishes maximum rates only. The statute explicitly permits carriers to discount from the maximum rates set. For purposes of their summary judgment motion, defendants have admitted their private agreement to maintain and not discount or deviate from prices at the maximum set by the agency, as alleged by plaintiffs. Affirming the District Court's grant of summary judgment on state action immunity grounds, the Court of Appeals held that the statute "must be construed as implicitly condoning" the alleged private agreement, and found that both prongs of the *Midcal* test had been satisfied.

Specifically, the Court of Appeals found that the requirement of an explicit state policy favoring the anti-competitive conduct was satisfied by the statutory scheme permitting joint applications for maximum rates, even though nothing in the statute suggests the existence

of a state policy favoring private agreements not to deviate or discount from prices at the approved maximum. Indeed, the statute contains a clear statement that state policy favors competition whenever possible in the interstices of the regulatory structure. Further, the Court of Appeals found that the ratesetting agency's action in setting maximum rates was tantamount to active supervision of the alleged private agreement not to deviate or discount from the approved maximum, even though nothing in the record indicates the agency was ever made aware of the private agreement.

In reaching these conclusions, the Court of Appeals completely ignored this Court's recent explanation of the principles of state action immunity in *Ticor*. More importantly, the result is completely incompatible with *Ticor*'s substantive holding, and in particular, with this Court's insistence on "real compliance" with both prongs of the *Midcal* test. Rather, the decision below expands the parameters of the state action immunity well beyond the principles of *Ticor*.

Unless it is corrected, the Court of Appeals' decision will have far-reaching and undesirable effects. It will promote uncertainty in the law, give rise to unnecessary litigation and hamper the State's antitrust enforcement program. It will affect the scope and design of state regulatory structures, constricting the field of choices open to their legislative architects. Ultimately, it does violence to the delicate federal balance which this Court was at pains to protect in *Ticor*.

Accordingly, this Court should grant plenary review or, in the alternative, summarily remand for reconsideration in light of *Ticor*.

ARGUMENT

I. INTRODUCTION.

In their Amended Complaint, the plaintiffs in this case alleged that the defendant workers' compensation insurance carriers organized a concerted economic boycott designed to coerce the Legislature into passing legislation which would permit defendants to collectively apply to the competent ratesetting authority for substantial increases in the maximum rates they were permitted to charge. Legislation authorizing joint applications for maximum rates was, in fact, passed by the Legislature in 1987. While allowing joint applications, the statutory scheme did not require insurance carriers to maintain and charge the maximum rates approved by the agency.[2] Rather, the legislation explicitly permitted individual carriers to discount from maximum rates upon filing with the ratesetting agency within 5 days after commencing use of the discounted rate. Me.Rev.Stat.Ann. title 24-A, §2362 (1988), App. 80. Moreover, the 1987 legislation left

---

[2] The 1987 legislation reinstated collective applications by repealing provisions enacted in 1985 which excepted worker's compensation from the then otherwise generally applicable rule permitting joint insurance ratemaking. *See Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138, 1146 fn.9 (1st Cir. 1993), App. 19 fn.9.

in place the State's clear policy choice to favor competition as far as possible consistent with the regulatory scheme.[3]

Beyond their allegation of a boycott to coerce legislative action, plaintiffs further alleged that defendants entered a private agreement to maintain, and not deviate or discount from the maximum rates set by the competent ratesetting authority in response to their joint application, after passage of the legislation they sought. Amended Complaint, ¶41(b), App. 42, 61-62; *and see Sandy River*, 985 F.2d at 1141, 1144, App. 7, 14. For purposes of the record on defendants' summary judgment motion (decided in their favor by the District Court and affirmed by the Court of Appeals) defendants apparently admitted to the features of the conspiracy described in the Complaint, including the alleged private agreement not to discount from the maximum rates allowed.[4]

The allegation that defendants had violated antitrust law by their private agreement not to deviate or discount from the allowable maximum rate was not the primary focus of plaintiffs' arguments to the District Court. Nevertheless, that allegation was properly before the District

---

[3] Me.Rev.Stat.Ann. title 24-A, §2301 (1988), App. 91, quoted in fn.1 above.

[4] *See Sandy River Nursing Care Center v. National Council on Compensation Insurance*, 798 F.Supp. 810, 814 fn.3 (D.Me.1992) ("[f]or purposes of this summary judgment motion . . . defendants have admitted that they conspired"), App. 29. There is nothing in the record by way of affidavit to call in question the existence of the alleged private agreement.

Court on defendants' motion. The court disposed of the allegation in the following terms:

> The 1987 legislation indisputably created a regulatory regime in which *uniform rates were required or authorized*. . . . "[T]he details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties" which the state rubberstamped or failed to evaluate.

Sandy River, 790 F.Supp. at 816, App. 34-35 (quoting *Ticor*, 112 S.Ct. at 2177) (emphasis added).

Contrary to the District Court's statement, however, the 1987 legislation did *not* require uniform rates; rather, it permitted (but did not require) a collective filing to propose a ceiling on rates from which downward deviation was not only possible, but was encouraged as a matter of policy. Nor were the details of the rates or prices in issue "established as a product of deliberate state intervention". Rather, the 1987 legislation called for the ratesetting agency to establish maximum rates only; moreover, plaintiffs had alleged (and for purposes of their motion, defendants had admitted) a *private* agreement to maintain prices at the maximum, *i.e.*, not to deviate downward from the approved maximum. There was nothing in the record to suggest that the ratesetting agency was even aware of this agreement.

The Court of Appeals nevertheless affirmed, holding: (1) that because it provided for joint applications for maximum rates, the 1987 legislation "must be construed as implicitly condoning an agreement among insurers to charge the rates they jointly propose"; (2) that the 1987 legislation constituted an affirmative expression of a

clearly articulated state policy favoring private agreements not to deviate or discount from the maximum rates allowed by the ratesetting agency; and (3) that the ratesetting agency's action in setting maximum rates constituted active supervision of the alleged private agreement. *Sandy River*, 985 F.2d at 1146-1147, App. 19-21. The court accordingly found defendants immune from antitrust liability on the ground that they had satisfied both doctrinal requirements of state action immunity identified by this Court in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (articulation of a clear and affirmative state policy; active state supervision of the anticompetitive conduct).

In so holding, the Court of Appeals compounded the District Court's error, and placed itself in direct conflict with *Ticor*, which had been handed down by this Court only seven months before.

II. THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH THIS COURT'S HOLDING IN *TICOR*.

As most recently formulated by this Court in *Ticor*, state action immunity can be grounded on a state law or regulatory scheme only if the State (1) has articulated a clear and affirmative policy to allow the anticompetitive conduct and (2) provides active supervision of anticompetitive conduct undertaken by private actors. *Ticor*, 112 S.Ct. at 2175. The Court emphasized

> the close relation of *Midcal*'s two elements. Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy.

Ticor, 112 S.Ct. at 2178. The Court made clear that "state-action immunity is disfavored", and will not attach without "real compliance with both parts of the *Midcal* test". *Id.* Thus to confer immunity is appropriate only if that result accords with the State's ascertainable intent; and only real compliance with both of *Midcal*'s prongs can provide the necessary assurance that the State, in fact, has chosen to displace the free market with regulation. In its decision below, the Court of Appeals failed to insist on real compliance with either prong, and placed itself in direct conflict with the substantive holding of *Ticor*.

A. The Court Of Appeals Erred In Ruling That A State's "Implicit Condonation" Of Anticompetitive Conduct Is Equivalent To Explicit State Policy Favoring Such Conduct.

While inexplicably failing to mention *Ticor*, the Court of Appeals, in ruling that defendants had satisfied *Midcal*'s first prong, placed heavy reliance on a 1985 case in which this Court held that "a state policy that expressly *permits*, but does not compel, anticompetitive conduct may be 'clearly articulated' within the meaning of *Midcal*." *Southern Motor Carriers Rate Conference v. U.S.*, 471 U.S. 48, 61 (1985) (emphasis in original); *see Sandy River*, 985 F.2d at 1146-1147, App. 20-21. However, the Court of Appeals disregarded an important distinction between *Southern Motor Carriers* and the case at bar.

In *Southern Motor Carriers*, this Court immunized the agreement of motor carriers to publicly file joint ratemaking applications under four state statutory schemes, those of Georgia, Mississippi, North Carolina and Tennessee.

Three of these statutes (those of Georgia, North Carolina and Tennessee) explicitly permitted (though they did not compel) the immunized conduct; the fourth statute (Mississippi's) made clear the state's intent to establish a regulatory program which would completely displace competition. 471 U.S. at 65-66, 65 fn.25. Here, in contrast, defendants seek immunity for a private agreement not to deviate or discount from prices at the maximum rate set by the competent agency. That activity finds no express sanction in any statute of the State of Maine; nor can it be said that a statute which, like Maine's, permits the setting only of *maximum* rates, is clearly intended to completely displace competition.

The Court of Appeals attempted to gloss over this distinction by opining that, although the relevant statute did not expressly permit the alleged private agreement, "it must be construed as implicitly condoning" such an agreement. *Sandy River*, 985 F.2d at 1146, App. 19. There are, however, three problems with this approach. First, the proposition that a statute which permits a joint filing by competitors seeking new maximum rates somehow, without more, authorizes a private agreement not to deviate or discount from the maximum rate set by the competent agency, is a logical *non sequitur*. Second, the statute in issue here instructs that "[n]othing in this chapter is intended to prohibit or discourage reasonable competition", a provision which surely is diametrically at variance with the Court of Appeals' theory of implicit condonation. Me.Rev.Stat.Ann. title 24-A, §2301 (1988), App. 91.

Finally, it is quite impossible to conceive how implicit condonation can in any event satisfy the insistence of

Ticor on real compliance with the requirement that the challenged restraint be one clearly articulated and affirmatively expressed as state policy. *Ticor*, 112 S.Ct. at 2176, 2178; *and see Southern Motor Carriers*, 471 U.S. at 57, quoting *Midcal*, 445 U.S. at 105 and *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion). In fact, Maine has never articulated, expressed or even vaguely intimated a state policy favoring private agreements, outside the regulatory process, not to deviate or discount from the maximum workers' compensation insurance rates allowed by the responsible agency. To the contrary, Maine has clearly indicated that, in the interstices of its workers' compensation ratesetting regulatory framework, competition remains the rule.[5] The Court of Appeals' determination that implicit condonation equates to explicit state policy thus represents a wide and disquieting departure from the law laid down by this Court in *Ticor*.

B. The Court Of Appeals Erred In Finding Active Supervision Of An Alleged Private Agreement Of Which The Ratesetting Agency Was Not Even Aware.

The purpose of *Midcal*'s active supervision prong, as this Court explained in *Ticor*,

---

[5] The Maine Attorney General's interpretation of governing state policy as expressed in state statutory law is entitled to some level of deference. *See* R. Langer, *The States Will Continue To Be Central Players In The Development Of Antitrust Policy*, Antitrust Report, May 1993, 3, 4 (if state attorney general takes the position that regulatory framework does not confer immunity from antitrust liability, special deference ought to be accorded) (citing *Ticor*).

> is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. . . . The question is not how well state regulation works, but whether the anticompetitive scheme is the State's own.

Ticor, 112 S.Ct. at 2177. Quoting *Patrick v. Burget*, 486 U.S. 94, 100-101 (1988), this Court emphasized that

> The active supervision requirement stems from the recognition that where a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. . . . The requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that . . . actually further state regulatory policies.

Ticor, 112 S.Ct. at 2177. In the present case, the Court of Appeals simply failed to apply this analysis.

Specifically, there is no suggestion on the record of this case that the ratesetting agency was ever aware of, much less approved or in any fashion supervised the alleged private agreement. It is accordingly impossible to logically argue that rates maintained and charged pursuant to the alleged private agreement not to discount were ever "established as a product of deliberate state intervention" or that the anticompetitive scheme was somehow "the State's own". *See Ticor*, 112 S.Ct. at 2177. Despite its illogic, the District Court actually assayed this argument, citing *Ticor*; the Court of Appeals simply

ignored the logical chasm, leaping to the conclusion that "the superintendent's involvement in reviewing and modifying the insurers' proposed [maximum] rates unquestionably meets prong two's requirement of active state supervision". *Sandy River*, 985 F.2d at 1147, App. 21; *and see Sandy River*, 790 F.Supp. at 816, App. 34-35 (quoting *Ticor*, 112 S.Ct. at 2177).

In other words, the Court of Appeals concluded that the ratesetting agency's action in setting maximum rates was tantamount to active supervision of a private agreement among carriers not to deviate or discount from approved maximum rates, an agreement of which the agency was not even aware. This amounts to a grant of immunity by implication – hardly a conclusion which comports with this Court's directive that "state action immunity is disfavored." *Ticor*, 112 S.Ct. at 2178. Further, it is a conclusion which stands in stark opposition to this Court's instruction that "[a]ctual state involvement, not deference to private price fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law." *Ticor*, 112 S.Ct. at 2176-2177.

III. THE ERROR INTO WHICH THE COURT OF APPEALS HAS FALLEN CARRIES BROAD IMPLICATIONS FOR FUTURE LITIGATION, STATE REGULATION AND THE BALANCE OF FEDERALISM.

Because it unquestionably extends the parameters of the state action immunity well beyond the principles laid down by this Court, the Court of Appeals' decision in this case will sow dragon's teeth of uncertainty, from which a

harvest of litigation, in this Circuit and elsewhere, must one day be reaped. The State of Maine, with limited resources available for antitrust enforcement, does not relish this prospect.

Moreover, the decision can be expected to affect the scope and design of legislation establishing state regulatory schemes. To the extent that it does, it will unnecessarily constrict the field of choices open to the architects of such legislative structures. *See Ticor*, 112 S.Ct. at 2178 (if states must act in the shadow of state action immunity whenever they enter the realm of economic regulation, the doctrine will impede their freedom of action). For ultimately, the Court of Appeals' erroneous decision does violence to the delicate balance of federalism which this Court was at pains to protect in *Ticor*.

CONCLUSION

This Court has emphasized its "insistence on real compliance with both parts of the *Midcal* test". *Ticor*, 112 S.Ct. at 2178. In this case, the Court of Appeals has departed widely from that stricture, and has instead cast "a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement". *Midcal*, 445 U.S. at 106. Because this error carries broad implications, this Court should grant *certiorari* in order to correct it. In

the alternative, the Court should summarily reverse, and remand for reconsideration in light of *Ticor*.

Respectfully submitted,

Dated: June 22, 1993

MICHAEL E. CARPENTER
Attorney General

STEPHEN L. WESSLER
Deputy Attorney General
(Counsel of Record)

FRANCIS E. ACKERMAN
Assistant Attorney General
Department of Attorney General
Consumer & Antitrust Division
State House Station 6
Augusta, Maine 04333
(207) 626-8800

THOMAS D. WARREN
Deputy Attorney General
Of Counsel

Supreme Court, U.S.
FILED
JUL 1 1993
OFFICE OF THE CLERK

No. 92-1874

In the
Supreme Court of the United States
October Term, 1992

SANDY RIVER NURSING CARE CENTER, et al.,
Petitioners,

v.

AETNA CASUALTY AND SURETY COMPANY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION

Siegel, Brill, Greupner & Duffy, P.A.
K. Craig Wildfang
Counsel of Record
Wood R. Foster, Jr.
Anne K. Weinhardt
1300 Washington Square
100 Washington Avenue South
Minneapolis, Minnesota 55401
(612) 339-7131

Opperman, Heins & Paquin
Vance K. Opperman
Robert J. Schmit
2200 Washington Square
100 Washington Avenue South
Minneapolis, Minnesota 55401
(612) 339-6900

Curtis, Thaxter, Stevens, Broder & Micoleau
Sidney St.F. Thaxter
John D. Gleason
One Canal Plaza
Portland, Maine 04112
(207) 775-2361

McTeague, Higbee, Libner, MacAdam, Case & Watson
Patrick N. McTeague
Four Union Park
Post Office Box 5000
Topsham, Maine 04086-5000
(207) 725-5581

Barnet D. Skolnik
One Canal Plaza
Post Office Box 7320
Portland, Maine 04112
(207) 775-2361

1993 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518
■ FAX 612-337-8053

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases: **Page**

Brown v. Ticor Title Insurance, 982 F.2d 386 (9th Cir. 1992) 7
California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 2, 7
City of Columbia v. Omni Outdoor Advertising, Inc., ____U.S.____, 111 S. Ct. 1344 (1991) 2, 3, 4
Federal Trade Commission v. Superior Court Trial Lawyers Ass'n., 493 U.S. 411 (1990) 2, 3, 4
Federal Trade Commission v. Ticor Title Insurance Co., ____U.S.____, 112 S. Ct. 2169 (1992) 7, 8
Hoover v. Ronwin, 466 U.S. 558 (1984) 2, 3, 4
Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, ____U.S.____, 113 S. Ct. 1160 (1993) 6
Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985) 6

Statutes:

§4 of the Clayton Act 3
Fed. R. Civ. P. 56 5
Me. Rev. Stat. Ann. tit. 24-1, §2301 (West 1988) 7, 8

Other Authorities:

P. Areeda & H. Hovenkamp, *Antitrust Law* ¶212.6 (Supp. 1992) 6

In the

Supreme Court of the United States

October Term, 1992

No. 92-1874

Sandy River Nursing Care Center, et al.,
Petitioners,

v.

Aetna Casualty and Surety Company, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION

The Joint Brief in Opposition ("Opp.") filed by the Respondent insurers, and the *Amicus Curiae* brief of the State of Maine ("*Amicus*") urging the Court to grant the instant petition, amply illustrate the reasons certiorari should be granted. While continuing to mischaracterize Petitioners' claims in the hope of retaining the mantle of state action immunity erroneously provided to them by the court of appeals, the Opposition provides scant grounds for confidence that the court of appeals' decision was correct; that its harmful effects on antitrust enforcement can be narrowly confined; or that the conflict between the First Circuit's expansive

treatment of the "clear articulation" prong of *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and the Ninth and Tenth Circuits' more rigorous two-part test will not result in uncertainty in the law and hamper the State's antitrust enforcement. *See Amicus* at 4.

Indeed, the State of Maine as *Amicus* persuasively argues that the decision of the court of appeals is objectively incorrect since under Maine's insurance regulatory scheme "competition remains the rule," *Amicus* at 11, and therefore the decision below "is in direct conflict with this Court's holding in *Ticor*." *Id.* at 8. Perhaps more important, the State of Maine properly fears that the "error into which the court of appeals has fallen carries broad implications for future litigation, state regulation and the balance of federalism." *Id.* at 13.

1. Respondents desire to, but cannot, distinguish *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n.*, 493 U.S. 411 (1990). Respondents' unfounded assertion that the courts below held that "*Trial Lawyers* is a fundamentally different case from this one," Opp. at 6, is plainly contradicted by the court of appeals' finding that *Trial Lawyers* was "a case closely analogous to the one before us." A-11.[1] Moreover, Respondents' assertion that *Trial Lawyers* is inapplicable, while a "coerced legislation" theory was "addressed and rejected" in *City of Columbia v. Omni Outdoor Advertising, Inc.*, ____U.S.____, 111 S. Ct. 1344 (1991) and *Hoover v. Ronwin*, 466 U.S. 558 (1984), is fallacious. Neither *Omni* nor *Hoover*, and indeed no decision of this Court other than *Trial Lawyers*, considered the proper antitrust treatment of a *per se* unlawful economic boycott utilized as a tool to coerce favorable treatment by the

---

[1]References to "A____" are to the Appendix to the Petition. References to "Jt. App." are to the Joint Appendix filed by the parties in the court of appeals.

government.[2] In *Trial Lawyers* this Court found that such a boycott was *per se* unlawful and not protected by the First Amendment. The equally important question presented here is whether the action of the government to end the boycott by capitulating to the boycotter's demands for an increase in price ceilings is, as a matter of law, a "superseding cause" which provides the boycotters with immunity from damage liability under §4 of the Clayton Act.[3] The Opposition fails to argue persuasively why this important question should not be answered by this Court.

2. Respondents also miss the mark when they argue that "*Omni* and *Hoover* are links in a fifty-year unbroken chain of cases uniformly holding that antitrust claims may not be premised on injury resulting from governmental action." Opp. at 6. Respondents' argument is indisputable, but inapposite. Thus, Respondents continue, as they have throughout this litigation, to mischaracterize Petitioners'

---

[2]*Omni* involved a claim that campaign contributions and long-time friendship with city council members supported an allegation that the City "conspired" with a billboard company to exclude competition, and provided the basis for recognition of a "conspiracy exception" to the City's otherwise applicable state-action immunity. 111 S. Ct. at 1350-51. In *Hoover* the allegation was that a committee appointed by the Arizona Supreme Court to grade bar examinations had set a grading scale to restrict the number of new attorneys. 466 U.S. at 565.

[3]Respondents do not appear to dispute that the question is an important one; rather, they suggest that a question's undisputed importance is insufficient for purposes of certiorari. Opp. at 6. ("The best that [Petitioners] can do is to suggest that [the question] was not addressed in *Trial Lawyers* and that it is 'important.'"). However, the question presented to the Court in *Trial Lawyers* was granted certiorari notwithstanding the lack of conflict among the courts of appeals precisely because the question was important. 493 U.S. at 421.

claims and to base their defense upon the single critical -- but flawed -- premise that Petitioners have not claimed any "direct marketplace injury" resulting from Respondents' *per se* unlawful conduct. The premise is critical because, without it, *Omni* is inapplicable, *Trial Lawyers* is indistinguishable, and Respondents' claim to the mantle of state action immunity is revealed for the artful sham that it is. The premise is flawed because it misstates Petitioners' claims and misrepresents the facts.

The plaintiffs in *Omni* and *Hoover* were injured *solely* because of governmental regulation (*i.e.* the restrictions on billboards and attorneys). The regulations themselves directly limited plaintiffs' ability to compete. In the instant case, however, Petitioners have never alleged that the source of their injury was the action of the State of Maine in raising the price ceilings; rather, Petitioners allege the injury was caused by Respondents' *private* agreement to utilize uniformly only the maximum rates.[4] Here, while the State's raising of the maxima may have enabled Respondents' agreement to cause *greater* damage to Petitioners, the raising of the maxima did not, in and of itself, injure Petitioners at all. Rather, as Petitioners have always maintained, they have been injured "by reason of" Respondents' violations of the antitrust laws. Amended Complaint ¶55. (A-68).

3. There is no basis for Respondents' assertion that Petitioners' "claim of a 'conspiracy not to deviate' from joint rates . . . was not presented until appeal," and is therefore

---

[4]As suggested in the Petition (at 18 n.12), if Respondents' view were correct, *any* private conspiracy to fix prices at government-set maxima would be immune from damage liability as involving "injury resulting from governmental action." Obviously, such an argument is untenable.

foreclosed. Opp. at 9-10.[5] Not only is this claim straightforwardly presented in Petitioners' Amended Complaint at ¶41(b) A42, 61-62,[6] the district court expressly addressed the allegation and disposed of it, albeit erroneously. A-34-35 (quoted in *Amicus* at 7). The Maine Attorney General also had no doubt that petitioners had alleged a "conspiracy not to deviate." *Amicus* at 6 ("Beyond their allegation of a boycott to coerce legislative action, plaintiffs further alleged that defendants entered a private agreement to maintain, and not deviate or discount from, the maximum rates . . . ."). In any event, the court of appeals quite properly

---

[5]In making this argument, Respondents misrepresent the record below when they claim (Opp. at 9-10) that Petitioners "did not challenge" the affidavit of the former superintendent of insurance, "did not seek discovery under Rule 56(f)," and "submitted no contradictory evidence under Fed. R. Civ. P. 56(e)." In fact, Petitioners *did* challenge the affidavit, *see* Plaintiffs' Statement of Material Facts as to Which It Is Contended There Exists A Genuine Issue To Be Tried, ¶5 (Jt. App. at 665), *did* seek discovery under Rule 56(f), *see* Second Affidavit of Sidney St.F. Thaxter (Jt. App. at 614) as acknowledged in the district court's opinion (A-29 n.3), and *did* submit contradictory evidence under Fed. R. Civ. P. 56(e), *see* Affidavits of Sidney St.F. Thaxter and appended materials (Jt. App. 566) and K. Craig Wildfang and appended materials (Jt. App. 677).

[6]Petitioners alleged, *inter alia*, a price fixing agreement in Count I of their Amended Complaint, ¶¶38-44 (A-60-63), and specifically alleged that "defendants agreed to utilize uniform rates which were higher than those which would have prevailed in the absence of defendants' conspiracy," *id.* ¶41(b)(A-62), an allegation that gave Respondents more than adequate notice that Petitioners were alleging an agreement to fix prices at a uniform level. Moreover, at oral argument in the district court Petitioners' counsel specifically described the claim: "[Plaintiffs were injured by] the use of rates after November 20, 1987 *up to the new ceiling that was set . . . . [Plaintiffs] were injured by these private defendants in their private conspiracy charging up to the new ceiling . . . .*" (Jt. App. at 734)(emphasis added).

decided the issue on the merits. A-18-22.[7]

4. Respondents largely fail to respond to the arguments in the Petition (at 18-26) regarding the need for review of the court of appeals' erroneous application of the state action doctrine. Respondents make just three points; none is persuasive. First, Respondents suggest that the fact that "on five occasions in the last eight terms" the Court has considered state action issues is an indication that there is nothing left to be said by this Court with respect to state action. Opp. at 10. Petitioners submit that exactly the contrary is true: that this Court's frequent re-visitation of the state action doctrine is an indication of the "pervasive vexatiousness" of the question of the extent of that immunity and the lower courts' continuing need for guidance in this difficult and oft-litigated area.[8]

Second, Respondents' claim that the Court's decision in *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985), is dispositive of the issue in this case is erroneous for the reasons stated in the Petition at 24-25 and in the *Amicus* at 9-11. The Opposition fails to address the crucial distinction between *Southern Motor Carriers* and the instant case. In *Southern Motor Carriers* the Court immunized the joint preparation and submission of rate

---

[7]By so doing the court was not only consistent with the strong policy favoring deciding issues on the merits rather than on technicalities, the court also properly, albeit implicitly, agreed with this Court's recent reaffirmation of the "liberal system of 'notice pleading' set up by the Federal Rules." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, ____U.S.____, 113 S. Ct. 1160, 1163 (1993). Thus, this issue is properly before this Court on petition for certiorari.

[8]*See, e.g.*, P. Areeda & H. Hovenkamp, *Antitrust Law* ¶212.6 (Supp. 1992).

proposals (the action challenged therein by the government) because *that activity* was clearly expressed as state policy and actively supervised by the states. In contrast, here the court of appeals has immunized a private agreement to charge uniformly maximum prices when the state has only permitted and supervised a separate activity, *i.e.* the joint preparation and filing of proposed maximum rates.

Finally, Respondents assert, but do not demonstrate, the absence of the conflict between the First Circuit and the Ninth and Tenth Circuits on the "clear articulation" prong of *Midcal*. Opp. at 13-16.[9] Incredibly, Respondents claim no conflict exists because in four of the five cited conflicting cases the *result* was a finding of no state action immunity. Opp. at 13-14. However, the existence of conflict among the courts of appeals is not determined by the outcomes of individual cases (since, obviously, facts may vary) but rather by examining the analysis, methodology and standards employed by the courts of appeals. On that score there can be no doubt that the Ninth and Tenth Circuits have employed a rigorous two-step test consistent with this Court's principles set forth in *Federal Trade Commission v. Ticor Title Insurance Co.*, ____U.S.____, 112 S. Ct. 2169 (1992), while the First Circuit has utilized an inconsistent "implicitly condoned" standard.

---

[9]Respondents suggest that Petitioners' failure to cite *Brown v. Ticor Title Insurance*, 982 F.2d 386 (9th Cir. 1992) to the court of appeals indicates that the conflict between the First and Ninth Circuits represents an "afterthought" by Petitioners. Opp. at 14 n.7. *Brown*, however, was decided on December 28, 1992, some three weeks *after* the argument in the court of appeals in the instant case. Similarly, Respondents' suggestion that the lower courts were unaware of Me. Rev. Stat. Ann. tit. 24-A, §2301 (West 1988) is incorrect; that statutory section appeared on the very first page of the statutes contained in the Regulatory Appendix submitted to the district court. *See* Jt. App. at 288.

5. Respondents' glaring failure to address at all the fact that 32 states have statutes favoring price competition identical to Me. Rev. Stat. Ann. tit. 24-1, §2301 (West 1988) is noteworthy. *See* Pet. at 5 n.4.[10] The Ninth Circuit and the First Circuit have reached diametrically opposed conclusions as to the existence of state action immunity in states with such statutes. Of the 32 states, 5 are in the First Circuit, 5 are in the Ninth Circuit, and 22 are in other circuits. State regulators in those states, and indeed insurers who do business in those states, now may be in doubt about whether such statutes are consistent or inconsistent with claims of state action immunity by insurers. This doubt will greatly diminish the regulatory choices available to states who may fear an unintended grant of state action immunity. *See Ticor*, 112 S. Ct. at 2178. Review in this case will help ease such doubts and will promote certainty and uniformity in the law.

6. The two questions presented by the instant petition raise issues of enormous importance that should be resolved by this Court. Those questions, however, present a single, fundamental, and critical policy question: Are the

---

[10]Respondents misquote this statute. Opp. at 15. Counsel for Respondents have indicated that they intend to correct the quotation. The statute provides:

> Nothing in this chapter is intended to prohibit or discourage reasonable competition, or to prohibit or encourage except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates . . . .

Me. Rev. Stat. Ann. tit. 24-A, §2301 (1988).

federal antitrust laws to be construed to permit competitors to aggregate their economic power to coerce favors from government, and then to be immunized by that governmental action when they deny the benefits of competition to consumers.

This important question should be answered by this Court. If Respondents and the court of appeals are correct in their view, and Petitioners submit they are not, then, in fairness to the governmental bodies which may be the targets of such coercive boycotts, this Court should explicitly state that when governmental bodies capitulate to the demands of the boycotters, they are also conferring antitrust immunity on the conspirators. If, on the other hand, Petitioners' views are correct, then this case presents an opportunity for this Court not only to correct a serious error by the court of appeals, but to strengthen the hand of governmental bodies in resisting such coercive boycotts, and to send an explicit message to those who would engage in such conduct that they do so at their peril.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in the Petition and in the *Amicus Curiae* brief of the State of Maine, the writ of certiorari should be granted.

Respectfully submitted.

SIEGEL, BRILL,
GREUPNER &
DUFFY, P.A.
K. Craig Wildfang
(Counsel of Record)
Wood R. Foster, Jr.
Anne K. Weinhardt
1300 Washington Square
100 Washington Avenue So.
Minneapolis, MN 55401
(612) 339-7131

OPPERMAN HEINS
& PAQUIN
Vance K. Opperman
Robert J. Schmit
2200 Washington Square
100 Washington Avenue So.
Minneapolis, MN 55401
(612) 339-6900

CURTIS, THAXTER,
STEVENS, BRODER
& MICOLEAU
Sidney St.F. Thaxter
John D. Gleason
One Canal Plaza
Portland, ME 04112
(207) 775-2361

MCTEAGUE, HIGBEE
LIBNER, MACADAM
CASE & WATSON
Patrick N. McTeague
Four Union Park
P.O. Box 5000
Topsham, ME 04086
(207) 725-5581

Barnet D. Skolnik
One Canal Plaza
P.O. Box 7320
Portland, ME 04112
(207) 775-2361

June 1993

FILED
AUG 20 1993
OFFICE OF THE CLERK

No. 92-1874

In the
Supreme Court of the United States
October Term, 1992

SANDY RIVER NURSING CARE CENTER, et al.,
Petitioners,

v.

AETNA CASUALTY AND SURETY COMPANY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

Siegel, Brill, Greupner & Duffy, P.A.
K. Craig Wildfang
Counsel of Record
Wood R. Foster, Jr.
Anne K. Weinhardt
1300 Washington Square
100 Washington Avenue South
Minneapolis, Minnesota 55401
(612) 339-7131

Opperman, Heins & Paquin
Vance K. Opperman
Robert J. Schmit
2200 Washington Square
100 Washington Avenue South
Minneapolis, Minnesota 55401
(612) 339-6900

Curtis, Thaxter, Stevens, Broder & Micoleau
Sidney St.F. Thaxter
John D. Gleason
One Canal Plaza
Portland, Maine 04112
(207) 775-2361

McTeague, Higbee, Libner, MacAdam, Case & Watson
Patrick N. McTeague
Four Union Park
Post Office Box 5000
Topsham, Maine 04086-5000
(207) 725-5581

Barnet D. Skolnik
One Canal Plaza
Post Office Box 7320
Portland, Maine 04112
(207) 775-2361

1993 — Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

BEST AVAILABLE COPY

5pp

In the

Supreme Court of the United States

October Term, 1992

No. 92-1874

Sandy River Nursing Care Center, et al.,
Petitioners,

v.

Aetna Casualty and Surety Company, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners submit this supplemental brief pursuant to Rule 15.7 to call the Court's attention to new cases not available at the time of the filing of Petitioners' Reply Brief to Brief in Opposition.

The decision of the Ninth Circuit in *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992), one of the cases which was identified by Petitioners in their Petition for Writ of Certiorari as conflicting with the analysis and result in the First Circuit in the instant case (*see* Petition at 10, 22-23), is now itself the subject of a

petition for a writ of certiorari. *See Ticor Title Insurance Company, et al. v. Walter Thomas Brown, et al.*, No. 92-1988. That petition raises, as does the instant petition, the issue of the proper application of the state action doctrine to the anticompetitive activity of a private party. These two petitions now provide the Court with the opportunity to clarify the degree of specificity of state authorization required for a finding that a private party's anticompetitive activity was undertaken pursuant to a "clearly articulated and affirmatively expressed state policy," the first prong of *California Retail Liquor Dealers' Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

Two other recent developments since the filing of Petitioners' Reply Brief also deserve brief mention. A petition for a writ of certiorari raising state action issues has been filed from the decision of the Fifth Circuit in *DFW Metroline Services v. Southwestern Bell Telephone Corp.*, 988 F.2d 601 (5th Cir. 1993). *See United States Metroline Services, Inc. v. Southwestern Bell Telephone Company*, No. 93-99. A petition for certiorari from an earlier decision of the Fifth Circuit in that case (*see* 947 F.2d 1486) was granted on June 22, 1992, and the judgment was vacated and the case remanded for further consideration in light of *Federal Trade Commission v. Ticor Title Insurance Co.*, 504 U.S. ____, 112 S. Ct. 2169 (1992). *See* 112 S. Ct. 2987 (1992). This new petition raises generally the issue of whether the Fifth Circuit, on remand, properly applied the Court's decision in *Ticor*.

In an opinion filed July 15, 1993, on remand from this Court in *Ticor*, *supra*, the Third Circuit properly applied the Court's state action standards set forth in the Court's opinion in that case and held that the defendants therein were not entitled to state action immunity in the states of Arizona and Connecticut. *Ticor Title Insurance Co., et al. v. Federal Trade Commission*, ____F.2d____,

1993 WL 259930 (3rd Cir. 1993).

These new petitions, together with the instant petition, demonstrate the continuing difficulty the lower courts have in applying the state action doctrine and the "pervasive vexatiousness" of "the extent, if any, to which [a private party] enjoys the state's immunity from antitrust liability, or, as the *Midcal* Court put it, if the state's involvement is merely 'a gauzy cloak . . . over what is essentially a private [restraint].'" P. Areeda & H. Hovenkamp, *Antitrust Law* ¶212.6 (Supp. 1992)(citation omitted). Thus, these new petitions reinforce the argument in the instant petition that the important questions presented therein should be reviewed by the Court.

Respectfully submitted.

SIEGEL, BRILL, GREUPNER & DUFFY, P.A.
K. Craig Wildfang
(Counsel of Record)
Wood R. Foster, Jr.
Anne K. Weinhardt
1300 Washington Square
100 Washington Avenue So.
Minneapolis, MN 55401
(612) 339-7131

CURTIS, THAXTER, STEVENS, BRODER & MICOLEAU
Sidney St.F. Thaxter
John D. Gleason
One Canal Plaza
Portland, ME 04112
(207) 775-2361

OPPERMAN HEINS
& PAQUIN
Vance K. Opperman
Robert J. Schmit
2200 Washington Square
100 Washington Avenue So.
Minneapolis, MN 55401
(612) 339-6900

Barnet D. Skolnik
One Canal Plaza
P.O. Box 7320
Portland, ME 04112
(207) 775-2361

MCTEAGUE, HIGBEE
LIBNER, MACADAM
CASE & WATSON
Patrick N. McTeague
Four Union Park
P.O. Box 5000
Topsham, ME 04086
(207) 725-5581

August 1993